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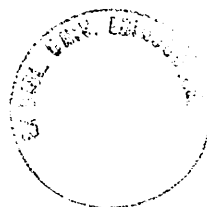
**The Maritime Zones of the United Arab
Emirates with particular reference to
Delimitation**

A Thesis Submitted for the Award of the Ph.D.

by

Matar Hamed Hlais Al Neyadi

**Department of Public International Law
Faculty of Law
University of Edinburgh
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To my parents, my wife and my children.

Abstract

This thesis is an examination of the United Arab Emirates claim to maritime zones and its practice in determining the boundaries of these zones. Such a comprehensive examination scarcely requires justification or introduction. The political and economic importance of determining the boundary of any state is self-evident. The matter of an undetermined boundary in the resource rich Gulf in particular was, and still is, a major threat to stability in the region.

This study focuses on the problem of unsettled maritime boundaries with particular reference to the effect of certain disputed islands on the UAE-Iran boundary in the Arabian Gulf. The study assumes that the less the impact these Islands are afforded, the greater the opportunity of reaching a solution to the related sovereignty dispute between the two parties. Certain methods of dispute settlement are suggested where the restricted effect of these Islands could most readily be obtained. Finally, this work has the benefit of examining the UAE Federal Law of 1993 in respect of delimitation of its maritime boundaries; the *Dubai/Sharjah Border Award* of 1981, which was published in 1993; and the UAE-Saudi Arabia secret boundary agreement of 1974, released in 1994.

The thesis is divided into seven chapters. The first will examine the issue of maritime zones in international law, as well as the UAE practice in this field. The second and third chapters will address the issue of maritime boundary delimitation in international law. Chapter Four will focus on the UAE practice in determining its maritime boundaries both internal and external. It will also identify the UAE's potential boundary with neighbouring states. Chapters Five, Six and Seven will be devoted to addressing the overall problem of the Iranian-UAE's un-delimited maritime boundaries. Chapter Five will examine the policy of the two states on offshore boundaries. It will also discuss the boundaries between Iran and the UAE in the Gulf of Oman and in the Abu-Dhabi sector. Chapter Six will discuss in some detail the issue of the three disputed islands, namely, Abu Musa, Greater and Little Tunbs islands, and their effect on the boundary of Iran and the UAE. It will also examine the effect of islands on maritime boundaries in general. The final chapter will address certain methods of disputes settlement that the parties have not yet utilised, which have the potential to facilitate an amicable solution.

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Abbreviations

<i>AJIL</i>	American Journal Of International Law.
<i>All ER</i>	All England Law Reports.
<i>BYBIL</i>	British Year Book of International Law.
<i>cf.</i>	Compare.
<i>CYIL</i>	Canadian Yearbook of International Law.
<i>DLR</i>	Dominion Law Reports.
<i>EEZ.</i>	Exclusive Economic Zone.
<i>EFZ</i>	Exclusive Fishing Zone.
<i>EPIL</i>	Encyclopaedia of Public International Law.
<i>FRG</i>	Federal Republic of Germany.
<i>GCC</i>	Gulf Co-operation Council.
<i>German Yrbk.</i>	German Year Book of International Law.
<i>ICJ Pleading</i>	International Court of Justice: Pleadings, Oral Arguments, Documents.
<i>ICJ Reports</i>	Reports of Judgements of the International Court of Justice.
<i>ICLQ</i>	International and Comparative Law Quarterly.
<i>IJIL</i>	The Indian Journal of International Law.
<i>IJMCL</i>	International Journal of Marine and Coastal Law
<i>ILC</i>	International Law Commission.
<i>ILM</i>	International Legal Material.
<i>ILR</i>	International Law Reports.
<i>ITLOS</i>	International Tribunal for the Law of the Sea.
<i>JILT</i>	Journal of International Law & Trade.
<i>JSZ</i>	UAE-Saudi Arabia Joint Sovereignty Zone.
<i>LOS</i>	The 1982 Law of the Sea Convention.
<i>Neths. YIL</i>	Netherlands Yearbook of International.
<i>NILR</i>	Netherlands International Law Review.
<i>NTIR</i>	Nordisk Tidsskrift for International Ret.
<i>ODIL</i>	Ocean Development and International Law.
<i>OGLTR</i>	Oil and Gas Law and Taxation Review.
<i>PCIJ</i>	Permanent Court of International Justice.
<i>TSCZ</i>	Territorial Sea and Contiguous Zone Convention of 1958.
<i>UAE</i>	United Arab Emirates.
<i>UNCLOS I</i>	The First United Nation Conference on the Law of the Sea.
<i>UNCLOS II</i>	The Second United Nation Conference on the Law of the Sea.
<i>UNCLOS III</i>	The Third United Nation Conference on the Law of the Sea.
<i>UNRIAA</i>	United Nations Reports of International Arbitral Awards.
<i>US</i>	United States.
<i>UTLJ</i>	University of Toronto Law Journal.
<i>VJIL</i>	Virginia Journal of International Law.

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Wimbledon Case, PCIJ Series A-Nº1.

Introduction

The focus of this study is the maritime boundaries of the United Arab Emirates in the Arabian Gulf.¹ The Gulf is a semi-enclosed sea which extends north-westward about 460 miles from its entrance at the Strait of Hormuz to the Shatta al Arab. Its maximum width is about 160 nautical miles.² The Arabian Gulf is unusually shallow,³ the average depth being only 35 metres. It is deeper on the Iranian than on the Arabian side.⁴ The shores in the Gulf are divided between seven states. These are, going counter-clockwise from the entrance of the Gulf, Iran (with the longest coastline), Iraq, Kuwait, Saudi Arabia, Qatar, the United Arab Emirates and Oman. In addition, there is the island state of Bahrain positioned close to the Arabian side of the Gulf. The Gulf has two particularly important features.⁵ First, in terms of natural resources—both living and non-living—it is one of the richest seas in the world.⁶ The second is that it contains a large number of islands.⁷

¹ The area is known also as the Persian Gulf. However, in this work, the term Arabian Gulf will generally be used to refer to the area in question. For an Iranian view on the name of the Gulf, see Amin, S. H., *International and legal Problems of the Gulf*, Middle East and North African Studies Press Limited, London (1981), at pp. 31-42.

² Young, Y., "The Persian Gulf," *New Direction in the Law of the Sea*, vol. 3, Nordquist *et al.* (eds), published by The British Institute of International and Comparative Law, vol.1, Oceana Publications Inc., Dobbs Ferry, New York (1973), at p.231; Amin, *Ibid.*, at p.9.

³ Hence, the entire area of the Gulf is within the technical reach of the oil industry." See Gault, L.T., "Offshore Boundary Delimitation in the Arabian/Persian Gulf," *Ocean Boundary Making*, Douglas M. Johnston and Phillip M. Saunders (eds.), Croom Helm, London (1988), at p.204.

⁴ According to Mitchell the "area of 20 metres or less in depth closely follows the coast of the United Arab Emirates to Abu-Dhabi city." See Mitchell, K., "The Persian Gulf," *Persian Gulf States: A General Survey*, Alvin J. Cottrell (ed.), The John Hopkins, University Press, London (1980), at p.541. See also Amin, *op. cit.*, n.1, at p.9; El-Hakim, A., *The Middle Eastern States and the Law of the Sea*, Manchester University Press, Manchester (1979), at p.66.

⁵ As far as its maritime boundary is concerned.

⁶ For more statistical information on the natural resources in the Gulf, see *al-Neshrh al-Hsaih al-Sanawih* (the Annual Statistical Report), Information Centre, statistics management, GCC Secretariat, Saudi Arabia (1992); *United Nations Economic and Social Commission for Western Asia, 1981-1990*, Thirteenth issue, Amman, December (1992); *The Statesman's Year-book*, Brian Hunter (ed.), The Chaucer Press, UK, (1991-2).

⁷ It is interesting to note that 200 of these islands are claimed by the UAE. See the statement of the UAE representative at the Third UN Conference on the Law of the Sea, *UNCLOS III Official Records*, vol. 6, at p.141, para.29.

The Strait of Hormuz connects the Arabian Gulf with the Gulf of Oman and the Arabian Sea, "its width varies between 29 and 51 nm."⁸ The Strait "is one of the most vital channels of trade in the world since about two-thirds of seaborne trade in crude oil pass through it."⁹

As will be seen from the map reproduced below, the United Arab Emirates is located in the eastern part of the Arabian Gulf and the Gulf of Oman. Its coastline extends for approximately 275 miles from Ra's Shàam on the west side of Ru'us al-Jibal to the Khor al-Udayd coastline at the south east of Qatar peninsula. In addition, the UAE occupies a 50-mile stretch of coastline on the Gulf of Oman between Dibà and Khutom al-Malàhah. It is encircled by four states, Iran in the north, Qatar and Saudi Arabia in the west, northwest, south and southeast, and Oman in the northeast and southeast.¹⁰ This geographical location imposes on the UAE the need to work out acceptable maritime boundary lines with its neighbouring states in a narrow and shallow area such as the Arabian Gulf.

The UAE was created in 1971. Prior to that time it was known as the Trucial Coast States. The individual Trucial States had long enjoyed a special relationship with the United Kingdom. This was first shown in 1806 through the conclusion of an agreement between al-Qawasim¹¹ and the East India Company.¹² In February 1820, another treaty was signed whereby the Trucial States accepted

⁸ *The Times Atlas and Encyclopaedia of the Sea* (1989), at p.154.

⁹ Ibid. See Chapter Six below for an illustrative map on navigation on the Strait of Hormuz. For more discussion on the importance of the Strait, see Amin, *op. cit.*, n.1, at p.49; Fadale, S.Y., "Strait of Hormuz: Its Nature and Regional and International Strategic Importance," *Attaawun Quarterly Journal*, issue no.9-5, Department of Information, GCC General Secretariat, Saudi Arabia (1988), at pp.39-68; Ramazani, R., *The Persian Gulf and the Strait of Hormuz*, Hurst, London (1972).

¹⁰ See the enclosed map.

¹¹ There were two great political groupings: an alliance of the al-Qawasim centred in Ras al-Khaimah, and the Beni Yas tribe centred in Abu-Dhabi had influence in the Trucial Oman. These two rival groupings resulted from the war between *al Ghafiri* and *al-Hinawi*. This war "had divided the whole of the coast of Oman during the early eighteenth century." See *Dubai-Sharjah Award*, 91 ILR, at p.558. For more discussion on the history of the area, see Slot, B.J., *The Arabs of the Gulf 1602-1784*, Leidschendam, the Netherlands (1993), at p.329; Al-Baharna, H., *The Arabian Gulf States*, 2nd ed, Librairie De Liban, Beirut (1975), at p.70; George Joffé, "The Concepts of Sovereignty in the Gulf Region," *Territorial Foundations of the Gulf States*, Schofield (ed.), UCL Press Limited, London (1994), at p.83; Smwir, Z., *Tarikh Sahl Oman Alssiasy* (The Political History of the Oman Coast), vol.2, Date Al-Sallasel Press, Kuwait (1985).

¹² For the text of the agreement, see *Arabian Treaties 1600-1960*, United Arab Emirates, Archive Editions, Penelope and Emma Quick (eds.), Redwood Press Ltd., England (1992), at p.413.

the cessation of plunder and piracy on both land and sea.¹³ In 1835, a maritime truce was concluded between Abu-Dhabi, Dubai, Sharjah and Ajman, with the mediation of the British Agent in the Gulf, to prevent conflict during the pearl-fishing season of the Gulf. The truce was renewed “on an annual basis from 1838 and then in 1843 for a period of ten years. Ultimately this arrangement was formally included within the Treaty of Maritime Peace in Perpetuity,¹⁴ of 24 August 1853.”¹⁵

In 1892 a new era began in the relationship between the Trucial States and Britain. This era commenced with the undertaking of each of the Chiefs of the Trucial States not to enter into any agreement or correspondence with any Power other than the British Government; not to consent to the residence within his territory of the agent of any other government, without the consent of the British Government; and finally to on no account to cede, sell, or mortgage, or otherwise give for occupation, any part of his territory save to the British Government.¹⁶ The undertakings were known as the “Exclusive Agreement.”

While an examination of the nature and scope of this agreement and the closely associated questions of the status of the Trucial States in international law during this period are beyond the scope of this paper, the following points should be noted. The 1892 Agreement did not contain a specific promise of protection. Nor did it give the British Government the right to represent the Sheikhdoms in their foreign relations. The Protection system, however, was developed in accordance with British practice,¹⁷ and they continued to conduct the foreign

¹³ Article 1 from the General Treaty for the Cessation of Plunder and Piracy by land and sea in 1820. For the text of the agreement, see Hawley, D., *The Trucial States*, George Allen & Unwin Ltd, London (1970), at pp.314-6.

¹⁴ The name of the Trucial States which was given to the region as a whole sprang from the Perpetual Truce Treaty of 1853.

¹⁵ In addition, there were a number of treaties between the Trucial States and Britain dealing with various matters, “such as the slave trade (Treaties of 1838, 1839 and 1847), the protection of telegraphic communications (1864) and the prevention of absconding debtors (1879).” See *Dubai/Sharjah Award*, at p.560. For the 1853 Treaty of Peace, see *Arabian Treaties, op. cit.*, n.12, at pp.469-70.

¹⁶ For the text of the agreement, see *Arabian Treaties, op. cit.*, n.12, at p.505.

¹⁷ Fawcett, J.E.S., *The British Commonwealth in the International Law*, Stevens & Sons, London (1963), at p.120. An example of this practice was that in a treaty with the Saudi Arabia in 1915, asserted that: “Kuwait, Bahrain, and... the Shaikhs of Qatar and the Oman Coast,...are under the Protection of the British Government, and...have treaty relations with the said Government.”

affairs of the Trucial States.¹⁸ The “relationships between the Emirates and Great Britain lasted for a century and a half. They rested upon what has often been called a ‘special relationship’, a complex of reciprocal rights and obligations which allowed Great Britain during the whole of this period to assert and maintain a privileged and exclusive position on the Trucial Coasts.”¹⁹ Given that this work is concerned with the question of maritime boundaries, it should be noted that it was stated that “no treaty authorised the British authorities to delimit unilaterally the boundaries between the Emirates and that no British administration ever asserted that it had the right to do so...therefore ...the consent of the Rulers concerned was necessary before any such delimitation could have been undertaken.”²⁰

In January 1968 the British Government announced its intention “to withdraw its forces from the Gulf region by the end of 1971.”²¹ On first of December 1971 a proposal to terminate the special treaty relationships between the United Kingdom government and the Trucial States Emirates of 1892 was presented to the governments of these Emirates. In letters to the British Political Resident at the Gulf, the governments of the Trucial States Emirates declared their acceptance of the British proposal.²²

On Second of December 1971 the British withdrawal from the region took effect, and it was announced that the Trucial States had been allied into a single state, to be known as the ‘United Arab Emirates’, with complete independence

Arabian Treaties 1600-1960, Saudi Arabia, vol. 4, Archive Editions, Penelope Tuson and Emma Quick (eds.), Redwood Press Ltd., England (1992), at p.103, Article 6.

¹⁸ An example of this conduct was that in the preamble to the United Kingdom-Saudi Arabia Arbitration Agreements of 1954 concerning the border dispute between Saudi Arabia, Oman and Abu-Dhabi over al-Buraimi oasis, Abu-Dhabi Emirate was described as a “*State for the conduct of whose foreign relations the Government of the United Kingdom is responsible.*” See *Ibid.*, at p.625. For a documentary study on UAE-Britain agreements, see Al-Sagri, S.H., *Britain and the Arab Emirates 1820-1956*, A documentary study, Thesis for Ph.D., University of Kent at Canterbury, UK (1988).

¹⁹ *Dubai/Sharjah Award*, at p.562.

²⁰ *Ibid.*, at p.567.

²¹ Al-Baharna, *op. cit.*, n.11, at p.xxi. For further discussion of the political developments in the period between 1968 and 1971, see Al-Baharna, *op. cit.*, n. 11, at pp. xxi to xxvii; Al-Alkim, H., *The Foreign Policy of the United Arab Emirates*, Saqi Books, London (1989), at pp.6-15; Gause, G., “British and American Policies in the Persian Gulf, 1968-1973,” 11 *Review of International Studies*, no. 4, October (1985), at pp.247-73.

²² Al-Baharna, *op. cit.*, n.11, at pp.396-8.

and full sovereignty. The Rulers of the Emirates (i.e. Abu-Dhabi, Dubai, Sharjah, Ras al-Khaimah, Ajman, Umm al-Qaiwain and Fujayrah), as the Provisional Constitution²³ indicated, had chosen the federal method of forming the government of the UAE.²⁴

The central feature of the UAE Constitution which is of relevance to this study was the decision to preserve the authority of each Emirate within its existing boundaries in all matters not assigned to the Union.²⁵ This was achieved by dividing constitutional competence between the federal government and the local authorities in the member Emirates. This separation of authority between the Union government and the local government in the member Emirates takes three different levels:

1- Exclusive exercise of sovereignty by the Union in respect of specific matters.

Article 120 enumerated these matters over which the federal government has exclusive legislative and executive jurisdiction. Foreign affairs, defence, security and currency are among these matters so allocated. As an exception to Article 120(1) of the Constitution, any member Emirate of the Union, according to Article 123, may enter into local and administrative agreements with neighbouring states. The constitutional requirements for such an exception, and the capacity of the member Emirates in international law to enter into a treaty relationship with neighbouring states, are discussed in detail in Chapter Four in the course of our examination of the UAE-Oman boundary.

2- Sharing jurisdiction between the Union authority and the local government.

This took the form of allocating to the Union government an exclusive legislative jurisdiction to regulate certain matters listed in Article 121 of the

²³ For further examination of the UAE Provisional Constitution, see Murad, N.A., *Territorial Disputes in the United Arab Emirates*. Thesis submitted for the degree of Ph.D. Department of Politics, University of Lancaster, UK (1990), at pp.258-70, see also Appendix no. 9 of Murad's thesis. And see Al-Baharna, *op. cit.*, n.11, at p. xlvii to p. lvii. In 1996 the word "Provisional" was omitted in a constitutional amendment, and the UAE's constitution becomes a permanent. See *Al-Itihad*, UAE daily newspaper, 15 December (1996), at p.1.

²⁴ For more discussion on the federal system of the UAE, see Al-Ulama, H.M., *The Federal Boundaries of the United Arab Emirates*, Thesis submitted for the degree of Ph.D. Department of Geography, University of Durham (1994), at pp.52-62.

²⁵ Article 3 of the Constitution, see also Article 120.

Constitution. Delimitation of territorial sea boundaries and the regulation of navigation are among these matters. Where Union laws do not govern matters listed in Article 121, the member Emirates of the Union may issue legislation to regulate these matters until such a time as the Union laws cover them.²⁶ In respect of executive jurisdiction, Article 121 remains silent. Thus the member Emirates exercise jurisdiction, in respect of those matters specified in the Article, over implementing Union laws in this respect, since they have jurisdiction in all matters not allocated to the Union.

- 3- Exclusive exercise of legislative and exclusive jurisdiction for the member Emirates “over their own territories and territorial waters in all matters which are not within the jurisdiction of the Union as assigned in [the] Constitution.”²⁷

This division of authority within the federal system justifies the existence of boundaries between the Emirates, and thus explains the need to determine them. The importance for present purposes of examining these internal boundaries, together with the UAE practice on determining its external boundaries, is that light will thereby be shed on the policy of the UAE on maritime boundary delimitation. The value of this exercise is to help understand the difficulty the UAE has in addressing the un-delimited sectors in its maritime boundary with neighbouring states.

²⁶ See *Collection of official Gazetteers for UAE*, Part 9, Abu-Dhabi (1989), at pp. 8316-20.

²⁷ Article 3 of the Constitution.

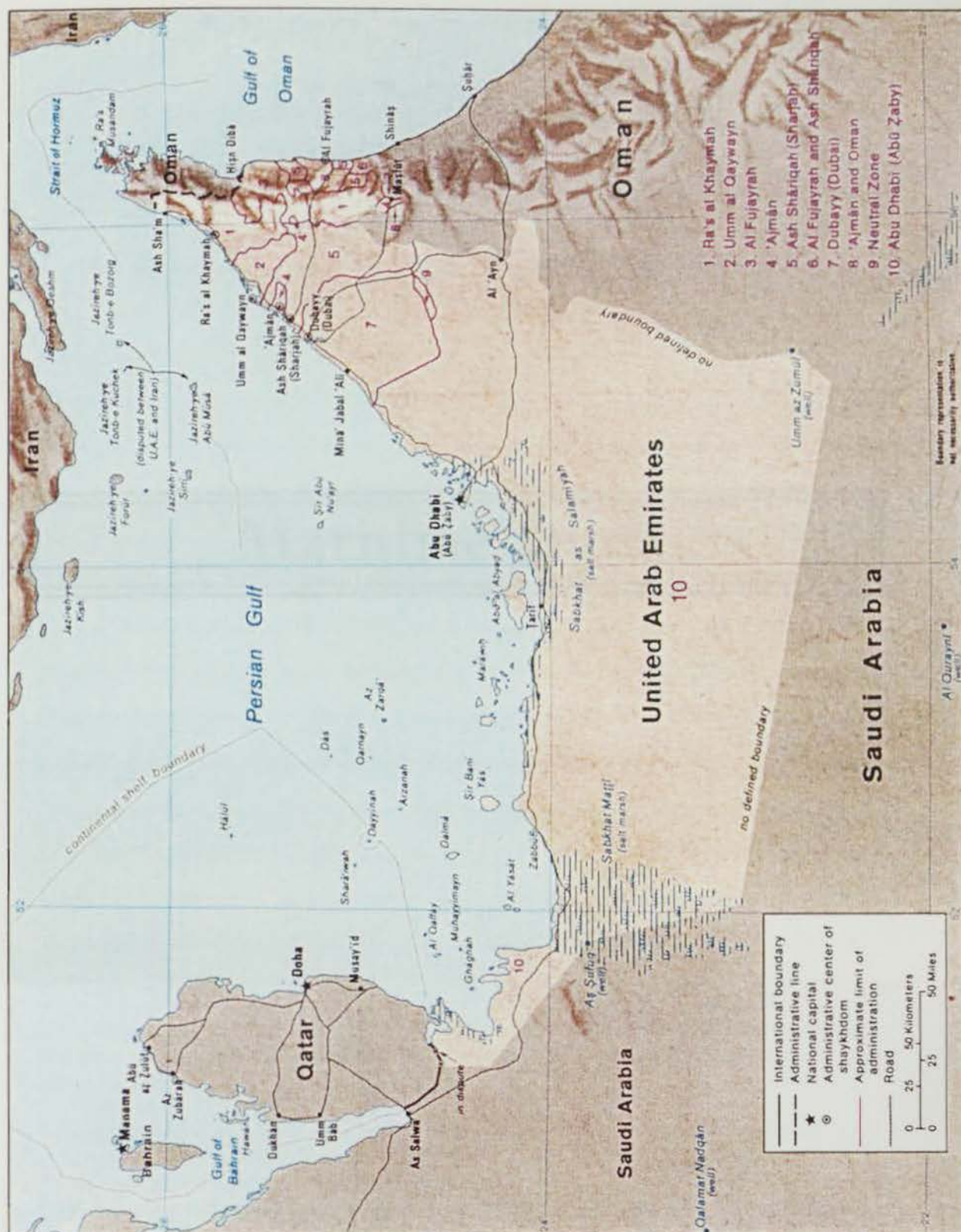


Figure: (1) The United Arab Emirates and neighbouring states.

Maritime Zones

Maritime Zones



Throughout history, states have employed different measures to protect the security of their land territories and the interests of their people. Extending coastal state control and jurisdiction over off-shore zones has been one of these measures.¹ This projection, however, obviously has an impact on the right of other states to enjoy the freedom of the seas for all.² International law in general recognizes the rights of coastal states to claim a territorial sea, contiguous zone, continental shelf and EEZ. Figure 2 below illustrates these four zones. Moreover, international law lays down specific rules that govern the rights and duties of coastal states in these areas, and the rules which determine the outer limit and the boundaries of these zones.³ In this chapter we will discuss these four zones, illustrated in figure 2, in terms of their outer limits, and provide an overview of coastal states' rights and duties in them. The importance of this discussion is that it will provide the necessary background for our analysis of the rules of maritime boundary delimitation in general and an examination of its application to the UAE in particular.⁴ Accordingly, this chapter does not discuss, except incidentally, the rules relating to: internal waters,⁵ navigation, fishing, pollution,

¹ Fitzmaurice, G., *The Law and Procedure of the International Court of Justice*, Cambridge University Press, Cambridge (1995), at p.204. See also the decision of the PCIJ in *North Atlantic Coast Fisheries Case* (1910), 11 *UNRIAA*, at p.205.

² Fitzmaurice, *op. cit.*, n.1, at p.204.

³ For a definition of the terms maritime boundary, see Jagota, S.P., "Maritime Boundary," 171 *Académie De Droit International* (1981-II), at p.90.

⁴ See Chapters Two, Three and Four.

⁵ Internal waters are one of the maritime areas which are recognized by international law. However, since this area is on the landward side of the baseline, it is extremely unlikely that there would be any question of a delimitation of its boundary with other states. Judge Oda, in his dissenting opinion in the *Gulf of Fonseca Case*, held to the conclusion that "the internal waters of one state can not abut the internal waters of another state." See *ICJ Reports 1992*, at p.746, para. 24.

scientific research, straits, archipelagic states, and the high seas regime, since these topics have no direct relevance to the rules of maritime boundary delimitation.

Our treatment of the subject falls into three broad categories. Firstly, we explain the relevant rules and recount the actual practice of various states in the period prior to 1958 for each of the maritime areas. Secondly, we study the approach to these matters taken in the 1958 Geneva Conventions and the 1982 Law of the Sea Convention. Finally, we consider the situation in the UAE.

For ease and clarity of exposition this chapter has been divided into five sections: viz., the territorial sea, the contiguous zone, the continental shelf, the EEZ and the legal regime of islands.

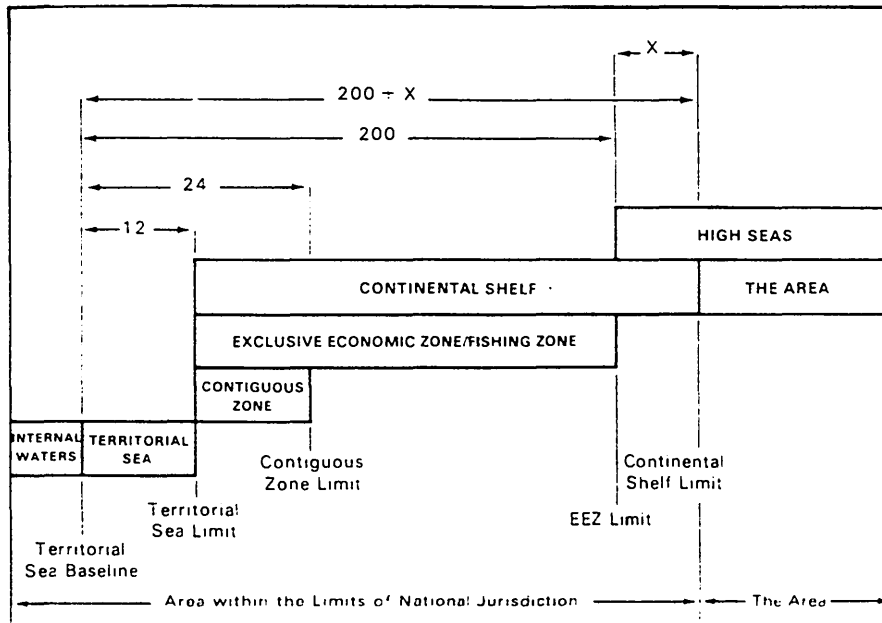


Figure: (2) Maritime zones within national jurisdiction.
Source: Brown, E.D., *Sea-Bed Energy and Minerals: The International Legal Regime*, vol. 1, Continental Shelf, 2nd ed, Martinus Nijhoff Publishers, the Netherlands, (1992), at p.12

Section One

Territorial Sea

Development of the concept

The idea of sovereignty over the seas appeared in the early seventeenth century when a number of states claimed control and sovereignty over seas adjacent to their coasts.⁶ Sweden, for example, claimed sovereignty over the Baltic Sea.⁷ Elsewhere, the King of England claimed sovereignty over the British seas.⁸

The theory that the sea is a *res nullius*, i.e. belongs to nobody, was the basis in the seventeenth century of the coastal states' extension of their jurisdiction over the sea by effective occupation. The exercise of power from the shore was the most direct and effective mode of occupation.⁹ The Permanent Court of Arbitration in the *North Atlantic Coast Fisheries Case* held in this respect that:

The marginal strip of the territorial waters based originally on the cannon-shot, was founded on the necessity of the riparian State to protect itself from outward attack, by providing something in the nature of an insulating zone.¹⁰

The *res nullius* theory asserted that the territorial sea is property like land, but subject to the right of innocent passage for foreign ships. However, the "property" theory was rejected by many writers, especially in Germany,¹¹ on the grounds that the sea, unlike the mainland, was incapable of appropriation. Consequently, a coastal state should be regarded as merely possessing rights of jurisdiction.¹² By

⁶ O'Connell, D.P., *The International Law of the Sea*, vol. 1, Shearer (ed.), Clarendon Press, Oxford (1982), at pp.2-3.

⁷ Ibid.

⁸ Ibid., at p.7. For more details on the origin of the territorial sea and on state practice in this regard, see Wilder, R.J., "The Three-Mile Territorial Sea: Its Origins and Implications for Contemporary Offshore Federalism," 32 *VJIL* (1991-1992), at pp. 689-97.

⁹ As will be seen this theory later yielded to the "cannon-shot" rule of measuring the breadth of the territorial sea.

¹⁰ *North Atlantic Coast Fisheries Case*, at p.205.

¹¹ Raumstheorie, for example, argued that: "Sovereignty is not the equation of property: it is not a right over territory, but the right to rule over it." Quoted from O'Connell, *op. cit.*, n.6, at p.66. For a detailed survey of the early academic controversy and states' position on the juridical nature of the territorial sea, see Chapter Three of O'Connell, *op. cit.*, n.6.

¹² Shearer, I.A., "Problems of Jurisdiction and Law Enforcement Against Delinquent Vessels," 35 *ICLQ* (1986), at p.323.

the nineteenth century, the doctrine of territorial sea had become accepted in customary law, and a distinction had been made between the high seas and territorial seas.¹³ The former were free and open to all, whereas the latter were subject to coastal states' exclusive rights and jurisdiction. State practice during this period, in regard to the nature of territorial sea, fell into two categories. (1) those, such as Britain and America who claimed sovereignty and plenary jurisdiction over a belt of water surrounding their coasts; (2) those, such as France and Spain, who did not claim sovereignty but merely jurisdiction, for specific purposes over the sea adjoining their coasts.¹⁴

The position of the first group of states was gradually preferred by a number of writers in the early twentieth century,¹⁵ and the tendency in state practice was to recognize that "coastal states have sovereignty over their territorial sea."¹⁶ This tendency was mirrored in the Hague Conference of 1930,¹⁷ where the majority of the participating states was in favour of coastal states exercising sovereignty over the territorial sea.¹⁸ The conference, nevertheless, failed to come out with a convention on the territorial sea regime. This was due to the difficulties of reconciling the different kinds and degrees of states' interests in respect to the width of the territorial sea.¹⁹

In the period following the Hague Conference up to 1949 the "controversy [over] the juridical nature of the territorial sea waned."²⁰ This was reflected in

¹³ See Elinu Root's argument in the *North Atlantic Fisheries*. Reproduced in Jessup, P.C., *The Law of Territorial Waters and Maritime Jurisdiction*, G.A. Jennings Co. INC, New York (1927), at p.5.

¹⁴ Churchill and Lowe, *The Law of the Sea*, Manchester University Press, New rev. ed., Manchester (1988). at p.60; O'Connell, D.P., "The Juridical Nature of the Territorial Sea," 45 *BYBIL* (1971), at pp.345-7.

¹⁵ O'Connell, *op. cit.*, n.6, at p.72.

¹⁶ Churchill and Lowe, *op. cit.*, n.14, at p. 62; O'Connell, *op. cit.*, n.6, at p.74.

¹⁷ The Hague Conference was the first attempt under the League of Nations to codify the rules of the law of the sea.

¹⁸ Indeed, this approach was adopted in the final text of the Second Committee, which was put before the Hague Conference. For the text of the Second Committee, see *League of Nations Conference for the Codification of International Law (1930)*, Rosenne S. (ed.), vol.4, Oceana Publications Inc., Dobbs Ferry, New York (1975) at p.1414; O'Connell, *op. cit.*, n.14, at pp.347-51.

¹⁹ See below.

²⁰ O'Connell, *op. cit.*, n.14, at p.343.

most subsequent state practice and in the writings of most scholars on the subject, where the territorial sea was regarded as a sea under the sovereignty of the coastal state.²¹

Attempts to codify state practice

(1) The International Law Commission

The International Law Commission [hereafter ILC] was “established in pursuance of General Assembly resolution 174 (II) of 21 November 1947, and in accordance with the statute of the Commission annexed thereto.”²² It was in charge of codifying the rules of international law and promoting its progressive development.²³ The task of codification of the law of the sea was divided into eight sessions, between 1949 and 1956. As far as the regime of the territorial sea was concerned²⁴ the ILC by the end of its eighth session submitted to the General Assembly a draft of 73 articles concerning the regime of territorial seas and high seas.²⁵ Article 1(1) of the draft articles removed any remaining doubt concerning the status of the territorial sea as an area where a coastal state has sovereignty.²⁶

²¹ Ibid., at pp. 352-7. See also *Abu-Dhabi Arbitration*, at pp.151-2; Churchill and Lowe, *op. cit.*, n.14, at pp.62-3; Gilmore, W., “Sea and Continental Shelf,” 21 *The Laws of Scotland* (1994), at p.11, para.11.

²² The Report of the ILC to the General Assembly, *ILC Yearbook* (1956), vol.2, at p.253, para.1.

²³ The Commission adopted the following items as an agenda: Regime of the high seas; regime of the territorial sea; law of treaties; diplomatic and consular intercourse and immunities; state responsibility; Arbitral procedure; question of amending Article 11 of the statute of the Commission; publication of the documents of the Commission; Co-operation with inter-American bodies; date and place of the ninth session; planning of future work of the Commission and other business. See *ILC Yearbook* (1956), vol.2, at p.253, para.5. See also Shaw, M., *International Law*, 3rd ed., Cambridge University Press, Cambridge (1991), at p.96; *Oppenheim's International Law*, 9th ed., vol. I, Peace, Jennings and Watts (eds.), Longman, London (1996), at pp.103-10.

²⁴ The ILC used the Hague Conference work as the basis of its task, see Churchill and Lowe, *op. cit.*, n.14, at p.63.

²⁵ Whiteman, M.M., *Digest of International Law*, vol. 4, Department of State Publication, Washington (1965), at p.1.

²⁶ Article 1(1) provided that: “The sovereignty of a state extends to a belt of sea adjacent to its coast, described as the territorial sea.” See Report of the International Law Commission covering the work of its eighth session, 23 April-4 July 1956, *ILC Yearbook* (1956), vol.2, at p.265. See also *Oppenheim's, op. cit.*, n.23, at pp.600-1.

(2) The First United Nations Conference on the Law of the Sea

The first United Nations Conference on the law of the sea was held in Geneva from 24 February to 27 April 1958. The conference yielded four international conventions on the law of the sea; ²⁷ viz. the Territorial Sea and Contiguous Zone Convention, ²⁸ the High Seas Convention, ²⁹ the Geneva Convention on Fishing and Conservation of the Living Resources of the High Seas ³⁰ and the Continental Shelf Convention. ³¹

There was no unanimity among writers with respect to the status of the Geneva Conventions of 1958 in customary law. O'Connell, for example, stated that:

What is now clear is that the Geneva Conventions cannot be regarded as a package all of the provisions of which are incumbent without regard to their genesis or character. For parties they are such a package, but for non-parties their rules apply only inasmuch as they are customary rules. ³²

Shaw has made a distinction between the Geneva Convention on the high seas and the other three conventions:

The 1958 Convention on the High Seas was stated in its Preamble to be "generally declaratory of established principles of international law", while the other three 1958 instruments can be generally accepted as containing both reiterations of existing rules and new rules. ³³

Bowett finally asserted that:

There are already clear indications that these Conventions have achieved a status as evidence of what present international law is far beyond that which is apparent from the list of formal ratifications. ³⁴

As this work is concerned primarily with the delimitation of maritime boundaries, only two of the four Geneva Conventions are relevant; the Territorial Sea and the Contiguous Zone Convention, (TSCZ) and the Continental Shelf

²⁷ In addition, the conference adopted an Optional Protocol of signature concerning the compulsory settlement of disputes.

²⁸ Which came into force on 10 September 1964. See *Multilateral Treaties Deposited with the Secretary General*, UN publications, New York (1986), at p.677.

²⁹ Which came into force on 30 September 1962, see *Ibid.*, at p.684.

³⁰ Which came into force on 20 March 1966, see *Ibid.*, at p.692.

³¹ Which came into force on 10 June 1964, see *Ibid.*, at p.694.

³² O'Connell, *op. cit.*, n.6, at p.23. To the same effect, see Gilmore, *op. cit.*, n.21, at p.2, para.2.

³³ Shaw, *op. cit.*, n.23, at p.338.

³⁴ Bowett, D.W., *The Law of the Sea*, Manchester University Press, Manchester (1967), at p.4.

Convention. The status of the relevant articles from these two conventions have been highlighted elsewhere in this work.³⁵

(3) The 1958 Territorial Sea and the Contiguous Zone Convention

The formula of Articles 1(1) and 2 of the ILC final report of 1956 were adopted almost unchanged³⁶ in the 1958 TSCZ Convention. They were worded as follows:

Article 1(1)

The sovereignty of a State extends, beyond its land territory and its internal waters, to a belt of sea adjacent to its coast, described as the territorial sea.

Article 2

The sovereignty of a coastal State extends to the air space over the territorial sea as well as to its bed and subsoil.

These Articles, which were reproduced in the 1982 Law of the Sea Convention³⁷ with some minor modifications,³⁸ were said by the World Court in the *Nicaragua Case* to, “merely respond to firmly established and longstanding tenets of customary international law.”³⁹

It should be noted that designating the territorial sea as an area of sovereignty entitles a coastal state to exercise prescriptive and enforcement jurisdiction over this area. The aim of such entitlement is to provide a coastal state with the necessary means to protect its interest in the territorial sea area. An example of this is the authorization in Article 21(1) of the 1982 Convention for a coastal state to adopt laws and regulations in respect to all or any of the specific issues listed in the Article. These matters included navigation, fisheries, customs and

³⁵ See for example Section Two and Three of the present Chapter, Section Two of Chapter Two and Section One of Chapter Three.

³⁶ Except for the insertion of the words “beyond its land territory and its internal waters.” For the motive behind this insertion, see *ILC Yearbook* (1952), at pp.145-52; *UNCLOS I Official Records*, vol. 3, at p.247 and p.117; see also O’Connell, *op. cit.*, n.6, at p.81.

³⁷ For further discussion on this convention, see below.

³⁸ These modifications are two: first the insertion of the words “ in the case of an archipelagic State, its archipelagic waters” after that to internal waters; second, Articles 1 and 2 were merged into Article 2 of the 1982 Convention.

³⁹ *Nicaragua v. US. Case* of 1986, at para.212. A similar view was held by the Newfoundland Court of Appeal in the case concerning *Reference re Mineral and Other Natural Resources of the Continental Shelf Case* (1983), 145 DLR 3d (1983), at p.23.

immigration laws.⁴⁰ Another example is the right of a coastal state to take the necessary steps in its territorial sea to prevent passage which is not innocent,⁴¹ or to exercise in some cases⁴² a criminal jurisdiction on board a foreign merchant ship⁴³ passing through the territorial sea to arrest any person or to conduct any investigation in connection with any crime committed on board the ship during its passage on the territorial sea.⁴⁴

(4) The breadth of the territorial sea

The difficulty of maintaining a balance between two opposing important principles, viz. the coastal states' respective interests in the belt of water contiguous to their coasts, and the principle that the sea is open to all, resulted in a disagreement among nations as to how to determine an acceptable limit for the territorial sea area. There were a number of vague criteria that had been used to determine that limit, such as the limits of visibility.⁴⁵ However, the principle of protection, which coastal states used to justify their claims to the territorial sea, had drawn Bynkershoek's attention to suggest the "cannon-shot" doctrine as a criterion to be used in determining the limit of territorial seas.⁴⁶ To do so, it was necessary to have artillery present at various places on coastline.⁴⁷ The cannon-shot doctrine, however, was not a universal approach in determining the limit of the

⁴⁰ Para. 3 of Article 21 calls on the coastal state that it "shall give due publicity to all such laws and regulations."

⁴¹ The 1982 Convention thoroughly illustrates the activities which may deprive the passage of a foreign ship of its innocent character. In the present context it will suffice to assert that passage is innocent as long as it is not prejudicial to the peace, good order or security of a coastal state. See Article 19 of the 1982 Convention.

⁴² See Articles 27, 73, 56(b), Article 211 and Article 220.

⁴³ Warships and other government ships operated for non-commercial purpose enjoy immunities from coastal state enforcement jurisdiction. In the event of non-compliance with the laws and regulation of coastal states, they may be "required to leave the territorial sea immediately." See Articles 30, 32 and 236 of the 1982 Convention.

⁴⁴ Article 27(5) of the 1982 Convention.

⁴⁵ For more discussion, see Wilder, *op. cit.*, n.8, at pp. 698-9; Al-Awadi, B., *General Principles of International Law of the Sea and Its Applicability in the Arabian Gulf*, Kuwait University Press, Kuwait (1988), at p.229.

⁴⁶ Bynkershoek, in this respect, wrote that "the territorial dominion of the state extended as far as projectiles could be thrown from cannon on the shore." Quoted from Jessup, *op. cit.*, n.13, at p.6, see also p.22. For further discussion on the cannon-shot rule, see Wilder, *op. cit.*, n.8, at pp.699-706.

⁴⁷ See the remark of Churchill and Lowe, *op. cit.*, n.14, at p.65.

territorial sea. Scandinavian states, for example, preferred to claim “maritime *dominium* over fixed distances from the shore along the whole coastline, regardless of the presence or absence of shore batteries. These distances were progressively narrowed from those claimed around the sixteenth century, and had largely settled at the four-mile Scandinavian ‘league’ by the mid-eighteenth century.”⁴⁸ In 1782, Galiani suggested replacement of the cannon-shot doctrine by a fixed limit of three miles along the shore of the coastal state. This limit was chosen as a matter of convenience and reasonableness and not because the 3-nautical-mile was the precise range of a cannon in that day.⁴⁹

Because the three-nautical-mile limit was to meet the interest of major naval powers in minimizing the area of national jurisdiction, and maximizing the area of high seas, it received wide-spread support from these states.⁵⁰ However, a claim for a wider limit was asserted by some states.⁵¹ This wider claim was sometimes extended up to twenty nautical miles.⁵² These different positions⁵³ were manifested in the Hague Conference, and caused the failure to reach an agreement on the question of the territorial sea limit.⁵⁴ The effect of this on the territorial sea limit was, as Gidel said, that it “killed the claim of the 3-mile limit to be a definite rule of international law.”⁵⁵

⁴⁸ Ibid.

⁴⁹ Ibid. See also *Oppenheim's, op. cit.*, n 23, at pp.611-2.

⁵⁰ For further discussion, see below at pp.11-2.

⁵¹ Churchill and Lowe, *op. cit.*, n.14, at p.66.

⁵² See the comment of Article 2 of the draft convention in Territorial Waters. A research organized by the Faculty of the Harvard Law School. (hereafter referred to as the Harvard Draft Convention). For more information about the research of Harvard Law School, see 23 *AJIL* Supplement, Special Number (1929), at p.3. The draft convention reprinted in the 23 *AJIL* Supplement, Special Number (1929), at pp.243-5. The comment of Article 2 is in the Supplement to 23 *AJIL*, at pp.250-6. The said report also gives an explanation for the differences between states in respect to the territorial sea limit, see the Supplement to 23 *AJIL*, at p.250. See also Churchill and Lowe, *op. cit.*, n.14, at p.66.

⁵³ For a general survey on states' statements and national legislation concerning the territorial seas' limit, see Harvard Draft Convention, Ibid., at pp.252-74.

⁵⁴ See Whiteman, *op. cit.*, n.25, at p.15. see also *Oppenheim's, op. cit.*, n.23, at p.612.

⁵⁵ Quoted from Waldock, C.H.M., “The Legal Basis of Claims to the Continental Shelf,” 36 *The Grotius Society* (1951), at p.116.

(5) Subsequent attempts to formulate an acceptable breadth

The ILC attempt to codify the rules of international law on a territorial sea limit was unsuccessful. The members of the ILC held conflicting views throughout the period between 1952 and 1956. “Some members of the Commission even felt that there is no rule of international law fixing a universal breadth for the territorial sea. At its eighth session in 1956, no single view was subscribed to by a majority of the members of the Commission, and it was unable either to formulate a statement of the existing law or to propose a new rule of international law.”⁵⁶

The inability of the ILC to reach a conclusion can be understood in the light of the state practice of that time. This practice might suggest that the three miles was the minimum distance which had been claimed by coastal states.⁵⁷ State practices with respect to the maximum limit of the territorial sea exhibited differences. Some states such as Britain, Germany, Japan, and the United States retained the three miles.⁵⁸ Other states such as Russia⁵⁹ and Iran claimed a 12-mile territorial sea limit.⁶⁰ The Scandinavian countries four miles, and several

⁵⁶ Whiteman, *op. cit.*, n.25, at p.76. The ILC, after coming out with draft articles concerning the law of the sea, recommended that: “the General Assembly should summon an international conference of plenipotentiaries to examine the law of the sea, ... and to embody the results of its work in one or more international conventions or such other instruments as it may deem appropriate.” See *UNCLOS I Official Records*, vol.1, at p.172, para.4. On 21 February 1957, the General Assembly adopted resolution no. 1105 (XI) to carry out the ILC. recommendation, see *Ibid.*, at p.172, para. 2.

⁵⁷ See Mr. Thomas Jefferson’s, the Secretary of State of the United States of America, note to the British Minister Mr. Hammond, and to the Minister of France Mr. Genet, reproduced in Harvard Draft Convention, *op. cit.*, n 50, at p. 252; and see Saudi Arabian draft resolution to the First United Nations Conference on the Law of the Sea, Document A/conf-13/c.1/L.153, *UNCLOS I Official Records*, vol. 8, at p.251. See also Churchill and Lowe, *op. cit.*, n.14, at p.68; Abu-Hife Ali, *Al-qanun aldwy alÁm* (Public International Law), 2nd ed, Al-bsir Press, Egypt (1948), at p.300.

⁵⁸ Jessup, *op. cit.*, n.13, at p.62; Dickinson, E.D., “Jurisdiction at the Maritime Frontier,” 40 *Harvard Law Review* (1926), at p.3.

⁵⁹ See the statement of Mr. Sazonoff, the Russian Foreign Secretary, reproduced in Jessup, *op. cit.*, n.13, at pp.27-8. A translation of the Russian Law of 29 May 1911 in extending Russian territorial sea limit was reproduced in the Report Harvard Draft Convention, *op. cit.*, n.50, at p.257.

⁶⁰ See the Iranian Act of 1959 on the Territorial Waters and Contiguous Zone, United Nations Legislative Series, *National Legislation and Treaties Relating to the Law of the Sea*, New York (1974), at p.10.

states, such as Spain, Italy, France and the Ottoman Empire, claimed to have control of specific activities beyond the three-mile limit.⁶¹

The situation did not improve in the first UN Conference on the Law of the Sea. The 1958 Territorial Sea and Contiguous Zone Convention which resulted from the Conference contained no article on the issue. This remarkable omission was a reflection of the conflict in the national interests between small states and superpowers. This conflict was centred, *inter alia*, on the following:

1. Small states were anxious to claim a 12-nautical-mile limit to keep the superpower fleets at a reasonable distance from their coasts. By way of contrast, the superpowers were anxious to minimize the limit of the territorial seas, thus being able to exercise a 'gun-boat' diplomacy and thereby put some pressure on small states.⁶²
2. Major naval states considered the extension of the territorial sea limit to a 12-nautical-mile as a threat to the freedoms of their forces' mobility rights, especially in international straits. Hence they did not accept the new limit, since such limit would cause some international straits, like the Strait of Hormuz, to be within the national jurisdiction of the strait states, instead of being a part of the high seas where the territorial sea is limited to three nautical miles.⁶³
3. Some states, especially those which depended primarily on fishing activities,⁶⁴ called for the 12-nautical-mile limit to secure the maximum area of exclusive

⁶¹ Jessup, *op. cit.*, n.13, at p.63; Churchill and Lowe, *op. cit.*, n.14, at p.66; *Oppenheim's, op. cit.*, n.23, at p.612.

⁶² Bowett, *op. cit.*, n.34, at pp.7-9; Bowett, D.W., "The Second UN Conference on the Law of the Sea," 9 *ICLQ* (1960), at pp.416-8.

⁶³ The US Department of Defence in a memorandum entitled "National Security and UN Convention on the Law of the Sea", suggested that about 135 straits "would have been closed as a result of the extension of the territorial sea to 12 NM." This problem, however, has been solved between the parties to the 1982 Convention by the provisions of Part 3 of the Convention which provides the right of transit through and over international straits. See the US Department of Defence Memorandum of July 1994, published in internet information services: <http://www.clark.net/pub/diplonet/dod.jcs.htm/>. For further discussion on this regime, see Churchill and Lowe, *op. cit.*, n.14, Chapter Five; Moore, J. N., "The Regime of Straits and the Third United Nations Conference on the Law of the Sea," 74 *AJIL* (1980), at pp.77-121; Reisman, W.M., "The Regime of Straits and National Security. An appraisal of International Lawmaking," 74 *AJIL* (1980), at pp.48-76; Schachte L. and Bernhardt A., "International Straits and Navigational Freedoms," 33 *VJIL* (1993), at pp.530-89; Gilmore, *op. cit.*, n.21, at pp.9-70, para.10.

⁶⁴ Such as Iceland, Mexico and Chile.

fisheries, “since territorial waters gave such exclusive” rights.⁶⁵ While, on the contrary, the ‘long-range fishing states’⁶⁶ insisted on maintaining to the 3-nautical-mile limit. This was to minimize the area of territorial seas, where their fleets could be excluded from fishing.⁶⁷

(6) The Second United Nations Conference on the Law of the Sea

This conference was held at Geneva from 17 March to 26 April 1960 “for the purpose of considering further the questions of the breadth of the territorial sea and fishery limits.”⁶⁸ A number of proposals were submitted to the Conference and can, generally speaking, be divided into two categories; The first proposal was a limit of twelve nautical miles, but if the breadth of a state’s territorial sea is less than this limit, it “may establish a fishing zone contiguous to its territorial sea provided, however, that the total breadth of the territorial sea and the fishing zone does not exceed twelve nautical miles.”⁶⁹ The second category suggested a six-mile territorial sea zone with a further six-mile fishing zone.⁷⁰ At the end of the Conference on 26 April 1960, no formulation had achieved the two-thirds majority required for approval.⁷¹

(7) The Third United Nations Conference on the Law of the Sea

The origins of the Third United Nations Conference on the law of the sea date back to 1967, when the General Assembly, following a proposal by the ambassador of Malta, adopted a resolution to establish a Sea-Bed Committee in order to examine the legal regulation of the deep sea-bed beyond national

⁶⁵ Bowett, *op. cit.*, n.34, at p.10.

⁶⁶ Such as France, the United Kingdom and the United States.

⁶⁷ Bowett, *op. cit.*, n. 34, at p.10.

⁶⁸ The United Nations General Assembly in a Res. no.VIII on 27 April 1958, see Whiteman, *op. cit.*, n.25, at p.119.

⁶⁹ The 12-nautical-mile limit was embodied in the Soviet Union proposal of 21 March 1960; in a 16-power proposal in April, 1960, and finally by the Mexico proposal of 21 March 1960, with some differences with respect to fishing zones when the breadth of the territorial sea was less than 12 nautical miles, see *Ibid.*, at pp.122-4.

⁷⁰ This was expressed in the US proposal of 23 March 1960, and in the Canadian proposal of 24 March 1960. In April, of the same year, the US and Canada each withdrew their earlier proposal in favour of a joint Canadian-US proposal with the same draft.

⁷¹ The joint Canadian-US proposal failing by only one vote to obtain the requisite majority. See *Ibid.* at p.136.

jurisdiction.⁷² However, in the post-1958 period, many newly independent states also wanted to review the 1958 Conventions because they did not have any role in the formulation of their articles due to their then colonial status.⁷³ Furthermore, “many States were increasingly concerned about the problems of overfishing and marine pollution off their coasts, neither of which could satisfactorily be controlled within the narrow jurisdictional limits on which the 1958 regime was based.”⁷⁴ The need to work out a comprehensive convention on the law of the sea, therefore, was put forward by many states. The General Assembly, as a result, adopted in 1970 Resolution No. 2750 by which it decided to convene a UN Conference “in order to carry out the negotiations and other work required to complete the drafting and adoption of articles for a comprehensive convention on the law of the sea.”⁷⁵

Unlike the Hague and Geneva Conferences, the Third United Nations Conference on the Law of the Sea had no text or report as a basis for discussion. It was, from the beginning, “seen as a political rather than a narrowly legal enterprise.”⁷⁶ The first meetings were held in New York between 3 and 15 December 1973 to examine the rules of procedure.

The problem of voting was the most difficult issue. The Conference adopted rules of procedure for discussion. In accordance with these rules, it was to conduct its discussion by way of consensus rather than through formal votes. In addition, the “Conference agreed to work on the basis of a ‘package deal’.” Implicit in this package deal concept was the assumption that the Convention should meet the minimum interests of the largest possible majority while

⁷² Churchill and Lowe, *op. cit.*, n.14, at p.13. For a historical background on UNCLOS III, see Nordquist M.H. and Choon-ho P. (eds.), *Reports of the United States Delegation to the Third United Nations Conference on the Law of the Sea*, The Law of the Sea Institute, Occasional Paper no. 33, Honolulu (1983), at pp.6-25; Gilmore, *op. cit.*, n.21, at para.3.

⁷³ Tommy Koh and Shanmugam Jayakumar, “The Negotiating Process of the Third United Nations Conference on the Law of the Sea,” *United Nations Convention on the Law of the Sea 1982: A commentary*, vol. I, Nordquist, M.H. (ed.), Martinus Nijhoff Publishers, the Netherlands (1985), at p.38.

⁷⁴ Churchill and Lowe, *op. cit.*, n.14, at p.14. See also Tommy Koh and Shanmugam Jayakumar, *op. cit.*, n.73, at p.38.

⁷⁵ *UNCLOS III Official Records*, vol. I, at p. vii.

⁷⁶ Churchill and Lowe, *op. cit.*, n.14, at p.14.

accommodating the essential interests of the major powers and the dominant interest groups. Another assumption implicit in this package deal concept was that there would be trade-offs and reciprocal support between various claims: for example, support for navigation freedoms in straits and in the Exclusive Economic Zone (EEZ) in return for support for claims for sovereign rights over resources.”⁷⁷

However, when attempts to achieve consensus had been exhausted, it was agreed that the formal votes rule, such as the traditional two-third majority, should be applied. The Conference carried on its work on a consensus basis until the final text of the Convention came up for approval, when the delegation of the United States called for a vote. The Convention was adopted by 130 votes in favour to 4 against, with 17 abstentions. The four negative votes were cast by Israel, Turkey, the United States and Venezuela; the abstentions included the Federal Republic of Germany and the United Kingdom.⁷⁸

The United Nations Convention on the Law of the Sea, 1982, [hereafter the 1982 Convention] was opened for signature on 10 December 1982 at Montego Bay in Jamaica. It was subject to ratification or accession by states, and was to enter into force 12 months after the date of deposit of the 60th instrument of ratification or accession. It entered into force on 16 November 1994.⁷⁹ The present status of the Convention, as of 3rd November 1997, was that 122 instruments of ratification, accession and succession had been deposited with the Secretary General of the United Nations. The last state which deposited its instrument of ratification was Portugal.⁸⁰

The delay in its entering into force was due to the fact that the industrialized states withheld their support or rejected the Convention. Part XI was the main

⁷⁷ Tommy Koh and Shanmugam Jayakumar, *op. cit.*, n.73, at p.40.

⁷⁸ *Limits in the Seas*, Series No.36, at pp.171-80.

⁷⁹ The 60th ratification was deposited by Guyana with the United Nations Secretary General on 16 November 1993.

⁸⁰ UN Legal Office, The Status of the United Nations Convention on the Law of the Sea of 10 Dec. 1982. See Internet information service: <http://www.un.org/Depts/los/los94st.htm>

reason that prevented industrialized states from accepting the Convention,⁸¹ and thus the number of ratifications increased only slowly. Most states who initially ratified the Convention were developing states. An attempt to enhance the prospect for widespread ratification of the convention originated in 1990 under the leadership of the UN Secretary General. On 28 July 1994 an agreement relating to the implementation of Part XI of the 1982 Convention was adopted by a vote of 121 in favour, none against, and 7 abstaining. This agreement “substantially accommodates the objections of the United States and other industrial states to the deep seabed mining provisions of the Law of the Sea Convention.”⁸²

(8) The Breadth of the Territorial Sea in the 1982 Convention

The Convention, with regard to the breadth of the territorial sea, adopted, in Article 3, the doctrine of the twelve-mile limit. Not surprisingly, the provisions of this Article had been incorporated in approximately 117 instruments of national legislation by 1994.⁸³ This wide adoption of Article 3 presents the question of whether or not it reflects present-day customary law. Regarding this, Shaw has written that:

Article 3 of the 1982 Convention...accords with the evolving practice of states [and there] is little doubt that this now reflects customary international law.⁸⁴

Churchill and Lowe in a similar manner assert that:

The twelve-mile limit is now firmly established in international law, and it is likely that the practice, if not always the legislation, of all States will in the near future be brought into line with this limit.⁸⁵

⁸¹ For example, President Reagan declared that the US would not sign the Convention because of its objection to Part XI dealing with deep sea-bed mining. See US Ocean policy statement, March 1983. Printed in the *Limits in the Seas*, Series No. 112, March 9 (1992), at pp. 78-80.

⁸² Oxman, B., “Law of the Sea Forum: the 1994 Agreement on the Implementation of the Sea-bed provisions of the Convention on the Law of the Sea,” 88 *AJIL* (1994), at p.695. See also Galdorisi, G., “The UN Convention on the Law of the Sea: A National Security Perspective,” 89 *AJIL* (1995), at pp.208-13. And see 27 *ODIL*, Special Double Issue in the New Law of the Sea, no.1 and 2 (1996). See also Jagota, S.P., *The Problems arising at the time of the Entry into Force of the 1982 Law of the Sea Convention*. Paper submitted at Qatar Conference on International Legal Issue Qatar, March 22-25 (1994).

⁸³ In contrast there were some other claims, as follows: 6 states still claiming 3-nm./ 2 states claim 4-nm./ 3 states claims 6-nm./ one state claims 20-nm./ 2 states claims 30-nm./ one state claims 35-nm/ one state claims 50-nm./ one state claims 200-nm/ and finally one state claims a rectangle. For more details, see *Limits in the Seas*, Series No. 36, 7th Revision, January 11 (1995), at p.166.

⁸⁴ Shaw, *op. cit.*, n.23, at p.349. See also O’Connell, *op. cit.*, n.6, at p.166.

The doctrine of the territorial sea in the United Arab Emirates

The developments of the territorial sea regime in the UAE can best be examined in two stages. (1) before 1971 during the period of the Trucial States; (2) after 1971 under the Federal State.

(1) The period prior to 1971

At the international level the member Emirates did not participate either at the First or the Second UN Conference of 1958 and 1960, respectively, on the Law of the Sea. This was for two main reasons: (1) The United Kingdom was responsible, as mentioned at an earlier stage of this work, for the foreign affairs of these Emirates in 1958 and 1960; (2) The lack of relevant experts in these Emirates would, in any event, have been an obstacle to taking a full and effective part at these international gatherings even if participation had been otherwise possible.

Moreover, these Emirates did not subsequently ratify any of the Geneva Conventions on the Law of the Sea.⁸⁶ Notwithstanding the debates of the legal status of the Emirates during their special relationship with the British, it should be noted that the UK never sought to extend its participation in multilateral conventions to the entities in question. Indeed it has specifically stressed this issue. For example, the British Government appended the following declaration to its ratification⁸⁷ to the 1958 Territorial Sea and Contiguous Zone Convention:

ratification of this Convention on behalf of the United Kingdom does not extend to the States in the Persian Gulf enjoying British protection. Multilateral conventions to which the United

⁸⁵ See Churchill and Lowe, *op. cit.*, n.14, at p.67. Moreover, the government of the United Kingdom stated in the *Anglo/French Arbitration* of 1977 that “coastal States today have a right under international law to extend their territorial sea to 12 miles. [The Court of Arbitration accepted the British argument, and thus took] account of the potentiality of an extension of [the Channel Islands] territorial sea from three to 12 miles.” *Anglo/French Arbitration*, at para.187.

⁸⁶ Thus it would only be bound by the provision of these Conventions so long as they were regarded as reflecting customary law.

⁸⁷ The British Government ratified the 1958 Territorial Sea and Contiguous Zone Convention on 14 March 1960. See the *Multilateral Treaties deposited with the Secretary-General*, UN publications, New York (1986), at p.679. Similar action was taken in respect of its ratification to the High Sea Convention of 1958, see *Ibid.*, at p. 687; the Fisheries Convention of 1958, see *Ibid.*, at p.692.

Kingdom becomes a party are not extended to these States until such times as an extension is requested by the Ruler of the States concerned.⁸⁸

At the domestic level there was no specific claim for territorial sea limits until late 1960. Prior to that time it was assumed that the three-nautical-mile limit was the breadth of the Emirates' territorial sea. The basis for this belief is reflected by a number of facts. Firstly, during this period the Emirates, as noted earlier, had a special relationship with the United Kingdom, which had supported the three-mile rule. Hence it was assumed that the rule would apply to the Emirates.⁸⁹ Secondly, a three-mile limit for oil concessions was claimed by some Emirates.⁹⁰ Finally, Lord Asquith in the *Abu-Dhabi Arbitration* stated, in regard to the Abu-Dhabi territorial sea limit, that:

I should have thought [the territorial water] expression could only have been intended to mean the territorial maritime belt in the Persian Gulf, which is a three mile belt.⁹¹

Professor Young, however, expressed his doubt as to whether Abu-Dhabi, except for the allocation of oil concessions, was bound by Lord Asquith's statement. His view was that since "the two principal coastal states, Iran and Saudi Arabia, [had] each expressly declared their adherence to a six-mile limit," it was erroneous to assert that a three-mile belt was the limit of the territorial sea in the Gulf.⁹² Indeed, Commanders Kennedy and Boggs in a joint report in 1948, regarding an orderly and equitable longitudinal line and lateral jurisdictional line in the Arabian Gulf, suggested that:

⁸⁸ It is worth mentioning here that, despite the generality of the last sentence of this declaration, the British government made no such declaration in the case of the 1958 Continental Shelf Convention. Whatever the reason for that omission, one could hardly conclude that the right of assertion jurisdiction and control over the sea-bed and subsoil area adjacent to the Emirates' coasts, did not lie within the jurisdiction of these Emirates. Indeed the assertion of jurisdiction over the continental shelf area was, with the exception of the Sharjah Emirate, the only maritime zone the Emirates had claimed during their special relationship with the British government. For further discussion on these continental shelf claims, see Section Three.

⁸⁹ Al-Baharna, H., *Arabian Gulf States*, 2nd ed, Librairie De Liban, Beirut (1975), at p.281.

⁹⁰ See, for example, the 1950 Oil Concession Agreement between the Ruler of Abu-Dhabi Emirate and the Superior Oil Company. The text of the agreement is reprinted in the *Arabian Treaties: 1600-1960*, Tuson P. and Quick E. (eds.), Archive Editions, vol.2, Redwood Press Ltd., England (1992), at p.729.

⁹¹ *Abu-Dhabi Arbitration*, at p.151.

⁹² Young, R., "Lord Asquith and the Continental Shelf," 46 *AJIL* (1952), at p.515.

Questions relating to the “seaward limit of territorial waters” involve: (a) questions regarding the width of the zone...Iraq and perhaps all other former Turkish states, including the Sheikdoms, may *therefore claim a 6-mile belt of territorial waters*.⁹³

In 1969 the first clear modern legislation concerning the question of the territorial sea was enacted in the Emirates. The Amir of Sharjah, on 10 September 1969, issued a Decree concerning the territorial sea of the Emirate of Sharjah and its Dependencies, and the territorial waters of its Islands. Article 1 reads:

The extent of the territorial sea of Sharjah and its Dependencies, and the territorial waters of its Islands, is twelve nautical miles, as measured by the rules of the territorial water Treaty issued by the Geneva Conference in 1958.^{94 95}

(2) The period after 1971

After the formulation of the Federation the UAE Government took part in the Third United Nations Conference on the Law of the Sea and supported the doctrine of 12 nautical miles for the territorial sea limit.⁹⁶ On 10 December 1982 the UAE signed the final Act of the conference but, to date, it has failed to ratify the resulting convention.⁹⁷

At the domestic level, the UAE Constitution did not specify the authority that was responsible for claiming maritime zones for the State.⁹⁸ One may suggest that the member Emirates were so entitled, since the jurisdiction of the Union was limited to the matters which were assigned to it in the Constitution.⁹⁹ However, in so far as claiming an off-shore zone is an act of foreign affairs, the Union—not

⁹³ Italics added. See *Arabian Boundaries Primary Documents 1853-1957*, vol. 21, Territorial Waters and Seabed Claims, Schofield and Blake (eds.), Archive Editions, Redwood Press Ltd., England (1988), at p.98; Al-Awadi, *op. cit.*, n.45, at p.229; Al-Khateeb, M., *The Legal Status of the Territorial Sea*, Thesis for Doctorate in Law, Cairo (1975), at p.670.

⁹⁴ For the text of the Amir of Sharjah's Decree, see the *Report of Trucial States Mediation*, unpublished studies on the matter of Sharjah Territorial Sea and Continental shelf rights. The report was prepared in 1970 by Bathurst, Jennings, and Ely and submitted to Sir Gawain Bell. A copy of the Sharjah Decree of 1969 is reproduced in Arabic and English on p.36 of vol. 2 of the report. Access to the report was kindly allowed by Clifford Chance Office, London, 1996.

⁹⁵ In March 1970, one year before the formation of the United Arab Emirates, a supplementary Decree to the 1969 decree was issued by the Emirate of Sharjah government. The text of this supplementary decree is reproduced in Al-Baharna, *op. cit.*, n.89, at pp.402-3. See Chapter Four below for further discussion about the effect of Sharjah's claim to a 12 nautical miles territorial sea limit.

⁹⁶ UAE statement on the 34th meeting-9 July 1974, *UNCLOS III Official Records*, vol. I, at p.141, para.35.

⁹⁷ See *Limits in the Seas*, Series No.36 (1995), at p.152.

⁹⁸ See the introduction for a discussion on the Union and the individual components respective jurisdiction.

⁹⁹ Articles 2 and 3 of the Constitution.

the member Emirates—is entitled to exercise such a power.¹⁰⁰ Indeed, in 1993 the Union authority issued a Federal Law to claim off-shore zones for the UAE. Federal Law no. 19 in respect of the Delimitation of the Maritime Zones of the United Arab Emirates makes provisions which cover five zones of maritime territory; internal waters, the territorial sea, the contiguous zone, the continental shelf and the EEZ.¹⁰¹ It also specifies the nature of the legal regime claimed in respect of these zones and stipulates the limit of the territorial sea, the contiguous zone, the continental shelf and the EEZ. In this section we shall limit our discussion to the territorial sea. Other areas will be discussed in subsequent sections of the present chapter.

Notwithstanding the fact that the 1993 Federal Law was the first municipal law to deal with the question of the territorial sea, it is difficult to hold that the UAE (and the Trucial States previously) had no territorial sea prior to that date. This was because, in the prevailing view in the literature,¹⁰² the sovereignty of a coastal state extends automatically by virtue of its sovereignty over the land, to a minimum belt of territorial sea around its coasts. The three miles limit had been generally accepted as “being the smallest claimed for the territorial sea during modern times.”¹⁰³ The justification for the automatic attachment of the territorial sea to any coast is that international law asserted certain rights and imposed certain obligations on a coastal state in respect to its sovereignty over the territorial sea.¹⁰⁴ These obligations presuppose the existence of a territorial sea where such duties can be fulfilled.¹⁰⁵ This extension of sovereignty does not depend on any municipal law or any national declaration.¹⁰⁶ In short, there are

¹⁰⁰ According to Article 120 of the Constitution the matter of foreign affairs falls within the exclusive legislative and executive jurisdiction of the Union.

¹⁰¹ *UAE Official Gazette*, issue No. 257, 1993. An English translation of this 1993 Federal Law may be found in *Law of the Sea Bulletin Series*, United Nations Division for Ocean Affairs and the Law of the Sea Office of Legal Affairs, No. 25, June (1994), at pp.94-100.

¹⁰² Fitzmaurice, *op. cit.*, n.1, at pp.202-3; Judge McNair’s dissenting opinion in *Anglo v. Norwegian Fisheries Case*, at p.166; *Abu-Dhabi Arbitration*, at pp.151-2; the *Beagle Channel Arbitration*, at p.179, para. 98.

¹⁰³ Churchill and Lowe, *op. cit.*, n.14, at p.68. See also above at p.10.

¹⁰⁴ See for example the obligation in Article 15(2) of the TSCZ (now Article 24(2) of the 1982 LOS). See also Fitzmaurice, *op. cit.*, n.1, at pp.204-5.

¹⁰⁵ Judge McNair’s dissenting opinion, *op. cit.*, n.102; Churchill and Lowe, *op. cit.*, n.14, at p.68.

¹⁰⁶ Judge McNair’s dissenting opinion, *op. cit.*, n.102.

ipso jure rights.¹⁰⁷ A municipal law, however, is necessary to determine the outer limit of the territorial sea, or “for the purpose of making special claims.”¹⁰⁸ Hence, national legislation on the territorial sea, such as the 1993 UAE’s Federal Law, did not convert a territorial sea area into the property of the UAE, but merely extended the breadth of this area to 12 nautical miles, and illustrated in some detail its existent sovereignty over it.

The UAE Territorial Sea

The United Arab Emirates has adopted the doctrine of a 12-nautical-mile limit.

Article 4 of the Federal Law reads:

The sovereignty of the State extends beyond its land territory and internal waters, to its territorial sea, the air space over the territorial sea as well as its bed and subsoil. The state shall exercise its sovereignty over the territorial sea in accordance with the provisions of this Law and the rules of international law.

The territorial sea of the State means the belt of sea waters beyond its land territory and internal waters and adjacent to its coast. It extends towards the sea with a breadth of 12 nautical miles from the baseline.

Five possible baselines are listed in Article 6 of the Federal Law. First, from the low-water mark where the coast of the mainland or a shore is exposed to the open sea. Second, from a straight line not exceeding 24 nautical miles in length joining the low-water marks of the entrance of bays. Third, from a straight line joining the outer points of the outermost islands forming the group. Fourth, from lines drawn adjacent to the seaward side of the outermost port or harbour installations. Fifth, from a low-tide elevation where it is wholly or partly situated at a distance from the mainland or from an island not exceeding 12 nautical miles.¹⁰⁹

¹⁰⁷ *ILC Yearbook* (1950), vol. I, at p.229. See also *Oppenheim’s International Law*, vol.1, 8th ed., Lauterpacht H. (ed.), Longmans, London (1955), at pp.501-2. For further details, see O’Connell, *op. cit.*, n.14, at p.352; Churchill and Lowe, *op. cit.*, n.14, at p.68.

¹⁰⁸ Fitzmaurice, G., “The General Principles of International Law,” 92 *Académie De Droit International* (1957-11), at pp.136-7.

¹⁰⁹ If the measurement of the UAE territorial sea resulted in a situation where an area of the EEZ was wholly surrounded by the territorial sea. Article 7 of the Federal Law in this relation provides that such an area shall form part of the state territorial sea, if it extends not more than 12 nautical miles .

The UAE Federal Law thus reproduces the rules and the principles of the 1982 Convention on the subject of baselines. The first mentioned baseline is found in Article 5 and the remaining baselines follow closely; Article 10(4) dealing with bays; Article 7(1) dealing with “locations where the coastline is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity”; Article 11 dealing with ports; and Article 13(1) dealing with low-tide elevations.

Having said that Article 4 extends the UAE sovereignty over the territorial sea, it should be stressed that it does not elaborate on the scope of this sovereignty. However, it makes reference to other provisions of the Federal Law and to the rules of international law, according to which the UAE should exercise its sovereignty. As we have noted, a coastal state in general is entitled to exercise legislative and enforcement jurisdiction over foreign merchant ships in its territorial sea area.¹¹⁰ The right of innocent passage is enunciated by Article 5 of the Federal Law. This Article denies the right of innocent passage to foreign warships without prior permission.¹¹¹ By way of contrast, the right of innocent passage for foreign merchant ships is reaffirmed in section one of this Article. In respect to the passage of aircraft over the territorial sea, there is no right, as a general rule, of overflight existing over a territorial sea. Therefore, the passage of foreign aircraft, whether merchant or military, is subject—according to Article 38(2) of the 1982 Convention—to prior authorization or notification. But, where the territorial sea includes a strait which is used for international navigation, such as the Strait of Hormuz, foreign aircraft enjoy the rights of transit passage regardless. Although the UAE lies close to the Strait of Hormuz, it is a matter of geographical and geopolitical acceptance that the Strait, as it appears from the

¹¹⁰ See above at pp.7-8.

¹¹¹ In international law there is some controversy over the recognition of an equivalent right for warships. For example, the Court in the *Corfu Channel Case* avoided answering the questioning of innocent passage of warships through territorial seas not included in a strait. See *ICJ Reports 1949*, at p.30. See also *Oppenheim's, op. cit.*, n.23, at pp.618-20; *O'Connell, op. cit.*, n.6, at pp.274-97; *Jessup, op. cit.*, n.13, at p.120; *Bowett, op. cit.*, n.62, at p.418; *McDougal and Burke, The Public Order of the Oceans*, Yale University Press, USA (1962), at pp.192-4; *Gilmore, op. cit.*, n.21, at p.9, para.9.

map below. “lies between Iran on the north and north-west and Oman on the south.”¹¹² This indeed is reflected in the fact that the two littoral states in the Strait reached, in 1974, an agreement to determine the boundary line between their territorial sea areas in the Strait of Hormuz.¹¹³ As a result the right of overflight over the UAE’s territorial sea is subject to prior authorization, since the UAE is not geographically a strait state.

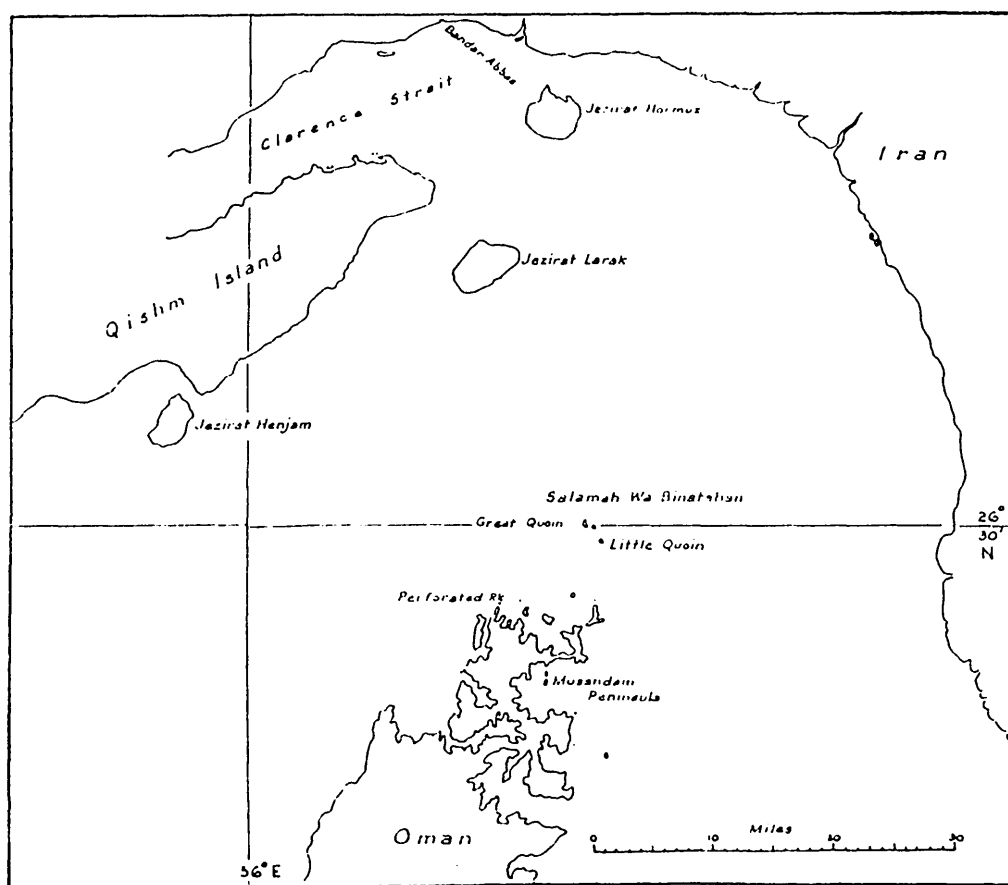


Figure: (3) Strait of Hormuz
Source: *UNCLOS I Official Records*, vol. 1, at p.155.

¹¹² For further geographical description to the Strait of Hormuz, see *UNCLOS I Official Records*, vol. 1, at pp.129-30.

¹¹³ For further discussion on this agreement, see Chapter Five/Section One.

Section Two

The Contiguous Zone

Development of the concept

After the doctrine of the territorial sea had become universally acknowledged, some coastal states began to exercise jurisdiction for the purpose of defence and for the prevention of infractions of certain of their laws—especially customs regulations—in a zone of the sea contiguous to and beyond the territorial sea limit. The Supreme Court of the United States (US) in 1891 pointed out this principle by holding that: “all governments, for the propose of self-protection in time of war or for the prevention of frauds on its revenue, exercise an authority beyond [the three-mile] limit.”¹¹⁴

As early as 1718, the British Government enacted legislation giving British customs officers the authority to visit any ship or vessel “found hovering on the coasts of the Kingdom, within the limits of any port.”¹¹⁵ In 1736, a Hovering Act came into force to permit seizure of ships within a limit of two leagues. By an Act of 1784, the distance was increased to four leagues, i.e. 12 miles, and then to eight leagues in 1802.¹¹⁶ However, the Queen's Advocate, in an opinion on the legality of the seizure of the French vessel, the *Petit-Jules*, twenty-five miles off the British shore in 1850, held that the seizure was unlawful under international law. As a result, the British government set free the one member of the crew who had been captured by the British authority, when they seized the vessel.¹¹⁷

Thereafter, the three-nautical-mile rule applied around the British isles and its dominions and colonies. “But this rule was subject to two qualifications allowing

¹¹⁴ Quoted from Jessup, *op. cit.*, n.13, at pp.76-7. See also Waldock, *op. cit.*, n.55, at p.121.

¹¹⁵ This power, according to the 1718 Act, should be exercised against a ship of the burden of 50 tons, or under, laden with customizable or prohibited goods. See Masterson, W.E., *Jurisdiction in Marginal Seas*, Cornwall Press, USA (1929), at p.8.

¹¹⁶ By an Act on June 22, 1802, as a result of an increase in smuggling trade. See *Ibid.*, at p.26 and p.73.

¹¹⁷ See *Ibid.*, at pp.127-9; Churchill and Lowe, *op. cit.*, n.14, at p.112.

the exercise of jurisdiction against foreign vessels at greater distances from shore.”¹¹⁸ These two cases were:

1. The doctrine of constructive presence. This is when a ship, hovering beyond the three-nautical-mile limit, sends its boats within that limit for the purpose of illegal fishing or smuggling or committing a crime under the British laws. In this case, the authority may seize the mother ship, although it is located beyond the British three-nautical-mile limit.¹¹⁹
2. The doctrine of hot pursuit. This is when a ship is found within the three-nautical-mile territorial sea, and there is good reason to believe that the ship has violated the laws of the coastal state. In this case it could, subject to the satisfaction of certain conditions, be pursued and arrested beyond the territorial sea limit.¹²⁰

In the United States, the government, by an Act of 1799, allowed vessels bound for the US ports to be boarded, examined and searched within four leagues off the American coast.¹²¹ In 1924, the US government concluded ‘The Liquor Treaty’ with the British government, whereby the British Government would raise no objection to a British vessel being searched by the US authorities off the American coast within a distance that could be traversed in one hour by a vessel suspected of endeavouring to commit an offence on the American coast.¹²²

¹¹⁸ Churchill and Lowe, *op. cit.*, n.14, at p.112.

¹¹⁹ McNair, *International Law Opinions*, vol. 1, Cambridge University Press, Cambridge (1956), at p.245; Fitzmaurice, *op. cit.*, n.1, at p.210. For a distinction between simple and extensive constructive presence, see O’Connell, *op. cit.*, n.6, vol.2, at p.1093. See also the case of *R. v. Sunila and Solayman* (1986), 28 DLR 4th (1986), at p.453. For the comment on this case, see Gilmore, W.C., “Hot Pursuit and Constrictive Presence in Canadian Law Enforcement,” 12 *Marine Policy* (1988), at pp.105-11. See again Gilmore’s comments on the case of *R. v. Mills and Others*, 44 ICLQ (1995), at pp.949-58; Reuland, R.C., “The Customary Right of Hot Pursuit on the High Seas; Annotations to Article 111 of the Law of the Sea Convention,” 33 *VJIL* (1993), at pp.557-89; finally, see Brownlie, I., *Principles of Public International Law*, 4th ed, Clarendon Press, Oxford (1990), at pp.245-8.

¹²⁰ The doctrine of hot pursuit was embodied in Article 23 of the Geneva Convention on the High Seas of 1958 and repeated in Article 111 of the 1982 Convention. See also Churchill and Lowe, *op. cit.*, n.14, at pp.112-3 and p.173.

¹²¹ Jessup, *op. cit.*, n.13, at pp.81-6; Dickinson, *op. cit.*, n.58, at pp.13-4.

¹²² See Colombos, C. J., *The International Law of the Sea*, 6th ed, Longmans, London (1967), at p.142.

Other states, such as Russia and France, claimed a customs' zone up to 12 nautical miles.¹²³ Italy, Spain, Denmark, Norway, Sweden and others adopted a range of between six and twelve nautical miles for customs' zones.¹²⁴

Attempts to codify state practice

In the Hague Conference of 1930, a proposal regarding the contiguous zone was submitted to the second commission. It was worded as follows:

On the high seas, adjacent to its territorial waters, the coastal State may exercise the control necessary to prevent, within its territory or territorial waters, the infringement of its Customs or sanitary regulations or interference with its security by foreign ships. Such control may not be exercised more than twelve miles from the coast.¹²⁵

However, the proposal was rejected by a group of states including Britain, Japan, Germany, Denmark and Netherlands. These states denied the validity of contiguous zone claims, and they asserted that a coastal state has no jurisdiction beyond the three-nautical-mile limit, except where a treaty is in existence, e.g. the Liquor Treaty, or under the doctrines of 'hot pursuit' and constructive presence.¹²⁶

In the period between the Hague and Geneva Conferences, the number of coastal states who claimed special zones on the high seas contiguous to their territorial seas increased. For this and other reasons the final report of the ILC of 1956 included a draft article on the subject of Contiguous Zone. It, in turn, was adopted unchanged in the 1958 Convention as Article 24. It provides:¹²⁷

In a zone of the high seas contiguous to its territorial sea, the coastal State may exercise the control necessary to :

- (a) Prevent infringement of its customs, fiscal, immigration or sanitary regulations within its territory or territorial sea;
- (b) Punish infringement of the above regulations committed within its territory or territorial sea.

¹²³ Jessup, *op. cit.*, n.13, at pp.86-8; Lowe, V., "The Development of the Concept of the Contiguous Zone," 52 *BYBIL* (1981), p.135-7.

¹²⁴ *Ibid.*, at pp. 89-91. The purpose of the Spanish claim to exercise jurisdiction up to six miles, in addition to customs, was fisheries. This claim, however, was challenged by some other nations. See Jessup, *op. cit.*, n.13, at p.42 and p.89; Masterson, *op. cit.*, n.115, at pp. 257-62.

¹²⁵ See Whiteman, *op. cit.*, n.25, at pp.485-6.

¹²⁶ See Churchill and Lowe, *op. cit.*, n.14, at pp.113-4. See also Lowe, *op. cit.*, n.123, at pp.130-3.

¹²⁷ For the status of Article 24 into customary law, see *Re Martines and Others*, 28 *ILR* (1959), at pp.173-4.

According to Article 24 the contiguous zone is not a part of the state's territory. A coastal state has only enforcement jurisdiction for the purpose of preventing and punishing any infringement of its customs, fiscal, immigration or sanitary laws within either its territory or territorial sea. It follows that a coastal state cannot exercise any jurisdiction regarding an offence committed within the contiguous zone.¹²⁸ The breadth of this enforcement jurisdiction zone may not extend beyond the 12 nautical miles from the baseline.

The contiguous zone under of the 1982 Convention

Article 24 of the 1958 TSCZ Convention was reproduced, with some modifications, in Article 33 of the 1982 Convention. These changes were threefold. First, the contiguous zone remains a part of the high seas under the 1958 Convention. By way of contrast under the 1982 Convention, it falls within the regime of the EEZ, and not within that of the high seas.¹²⁹ The consequence of shifting the legal status of the contiguous zone from the high seas' regime to the EEZ regime is that, if a conflict arises concerning a claim of jurisdiction by a coastal state and it is not assigned in the convention, such a conflict should be resolved on the basis of equity and in the light of all the relevant circumstances. But, under the 1958 Convention, such conflict would be resolved against the existence of coastal state jurisdiction over foreign ships, because ships on the high seas are subject only to the jurisdiction of the flag state.¹³⁰ Furthermore, regarding the contiguous zone as a part of the EEZ regime would attribute, by virtue of the provisions applicable to the EEZ, additional powers of prescriptive and enforcement jurisdiction to be exercised in that area.¹³¹

¹²⁸ This view, however, is not universal. A number of states considered that Article 24 "was merely permissive, not exhaustive, and that contiguous zones, apparently including both enforcement and legislative jurisdiction, could be established for purposes other than those detailed in the article." See Churchill and Lowe, *op. cit.*, n.14, at p.117; see also Harris, D.J., *Cases and Materials on International Law*, 4th ed, Sweet & Maxwell, London (1991), at p.410.

¹²⁹ In fact, Article 33 did not indicate the legal status of the contiguous zone; it is referred to only as 'a zone contiguous to'. However, because the EEZ extends up to 200 nautical miles from the baseline from which the breadth of the territorial sea is measured, there is a strong argument to suggest that the contiguous zone becomes part of the EEZ regime.

¹³⁰ *Lotus Case (1927)*, PCIJ Reports Series A-N°10, at p.25.

¹³¹ See below for more discussion on the EEZ regime.

Second, the breadth of the contiguous zone was set at 12 nautical miles under the 1958 Convention, but it was extended to twenty-four nautical miles under the 1982 Convention. This “largely because most States now claim a twelve-mile territorial sea.”¹³² To allow these territorial sea claims, “UNCLOS III decided to move the contiguous zone seaward” to 24 nautical miles.¹³³

Finally, paragraph 3 of Article 24 dealing with the delimitation of contiguous zone boundary was omitted from Article 33 of the 1982 Convention. This may be due to the fact that the delimitation of the EEZ boundary will automatically bring about the delimitation of the contiguous zone.¹³⁴

The Concept of the contiguous zone in the United Arab Emirates

The Federal Law of 1993 gives the UAE government, in the zone contiguous to its territorial sea, the right to exercise supervision and control for preventing and punishing infringement of its security, customs, fiscal, sanitary or immigration laws within its land territory, internal waters or territorial sea. The provisions of the Federal Law, without the addition of the word security, are identical to those granted to coastal states in Article 33(1) of the 1982 Convention.¹³⁵

The breadth of the contiguous zone is provided for in Article 11. This stipulates a breadth of 12 nautical miles measured from the outer limit of the territorial sea of the UAE which, as has been seen, extends up to 12 nautical miles from the baselines. Here again the provision of the Federal Law is in agreement with the provisions of Article 33(2) of the 1982 Convention.

¹³² Churchill and Lowe, *op. cit.*, n.14, at p.116.

¹³³ *Ibid.* See here the remark of Churchill and Lowe on the necessity of the contiguous zone, as a protection area, after the extension of the territorial sea to 12 nautical miles.

¹³⁴ Caflisch, however, contemplates that some problems may arise where a state has made no claim to EEZ. See Caflisch, L., “Maritime Boundary Delimitation,” 11 *EPIL* (1989), at p. 214.

¹³⁵ For the question of the validity of claiming a security zone in time of peace, see Whiteman, *op. cit.*, n.25, at p.486. See also *ILC Yearbook* (1956) vol.2, at p.295; Oda, S., “The Concept of the Contiguous Zone,” 11 *ICLQ* (1962), at pp.147-8; Brownlie, *op. cit.*, n.119, at pp.203-4; Fitzmaurice, *op. cit.*, n.1, at p.207; Churchill and Lowe, *op. cit.*, n.14, at p.117. It is interesting to note that the UAE claim of control for preventing and punishing infringement of its security is not an unusual claim in state practice. Similar claims were made, for example, by Iran, Bangladesh, Burma, Sri Lanka, Sudan, Syria, Venezuela, and Yemen. For more details, see *Limits in the Seas*, Series No.112, at p.34 and No.114, at p.14, and pp.30-2.

Section Three

The Continental Shelf

Development of the concept

In September 1945, in his well-known Proclamation, US President Truman claimed jurisdiction over the adjacent continental shelf for the purpose of exploiting its resources.¹³⁶ This claim, which was justified on the basis of justice and reasonableness,¹³⁷ was described by the World Court in the *North Sea Cases* “as the starting point of the positive law on the subject.”¹³⁸

Other unilateral claims by other states followed the Truman Proclamation. In general, these claims may be said to fall into two groups. First, claims consistent with the Truman Proclamation, such as the various claims of the Gulf States.¹³⁹ Second, claims asserting actual sovereignty over the shelf area, and not just jurisdiction and control over its resources. Such claims may be found in the various proclamations and enactments issued by the Latin America countries.¹⁴⁰

The difference between the two groups is that the second type of claim regards the continental shelf as a part of state territory. Such claims, in some cases, extended to the superjacent waters and to the air space above them and not

¹³⁶ This Proclamation “while asserting jurisdiction and control of the United States over the mineral resources of the continental shelf,...in no wise abridges the right of free and unimpeded navigation of waters [or] the character of high seas above the shelf, nor does it extend the present limits of the territorial waters of the United States.” For the text of the Truman Proclamation, see United Nations Legislative Series, *Laws and Regulations on the Regime of the High Seas* (1951), vol.1, at pp.38-40.

¹³⁷ See the text of the Truman Proclamation, *Ibid*.

¹³⁸ *North Sea Cases*, at para. 47.

¹³⁹ These claims are printed in the United Nations Legislative Series, *op. cit.*, n.136, at pp.23-9. For evaluation of the claim of the United Arab Emirates as one of the Gulf States, see below.

¹⁴⁰ See for example Article 1 of the Argentine Decree no.14, 708 of 1946; the Chilean Declaration of 1947; the Costa Rican Decree-law, no.190 of 1949; Articles 1 and 2 of the Peruvian Decree no.781 of 1947. See the United Nations Legislative Series, *op. cit.*, n.136, at pp.4-17.

just to the sea-bed and subsoil.¹⁴¹ By way of contrast, the claims of the first group were limited to the assertion of jurisdiction over continental shelf resources.¹⁴²

This practice did not lead immediately to the acceptance of the doctrine of the continental shelf as a rule of international law. This was acknowledged by Lord Asquith in the *Abu-Dhabi Arbitration*, between Petroleum Development Ltd and the Abu-Dhabi Emirate in 1951. In his words:

I am of the opinion that there are in this field so many ragged ends and unfilled blanks, so much that is merely tentative and exploratory, that in no form can the doctrine claim as yet to have assumed hitherto the hard lineaments or the definitive status of an established rule of International law.¹⁴³

In supporting Lord Asquith's opinion, the Supreme Court of Canada, in *Reference re the Seabed and Subsoil of the Continental Shelf Offshore Newfoundland*, 1984, held that:

we conclude: (c) in any event, international law did not recognise continental shelf rights by 1949, such rights were not indisputably recognised before the Geneva Convention of 1958.¹⁴⁴

The legal basis of jurisdiction over the continental shelf

(1) *The concept of effective occupation*

This concept is based on the idea that the sea-bed and subsoil of the sea beyond the three-mile territorial sea limit is *res nullius*, and it is capable of acquisition by effective occupation.¹⁴⁵ Waldock, in his article 'The Legal Basis of Claims to the Continental Shelf', was of the view: "that the continental shelf under the high seas is capable of occupation but the seas themselves are not."¹⁴⁶

¹⁴¹ For example, Article 1 of the Argentine declaration on the continental shelf asserted that: "Argentine epicontinental sea and continental shelf are subject to the sovereign power of the nation." See United Nations Legislative Series, *op. cit.*, n.136, at p.5.

¹⁴² In addition, the claim of the Latin America Countries was sometimes extended to 200 nautical miles, irrespective of the geological entity of the area. See *Abu-Dhabi Arbitration*, at pp.153-4.

¹⁴³ *Ibid.*, at p.155.

¹⁴⁴ See 5 *DLR* 4th (1984), at p.419, para. 2(c) in the conclusion. For comment and discussion on the dispute between Newfoundland and the Canadian Federal government, see Gilmore, W., "The Newfoundland Continental Shelf dispute in the Supreme Court of Canada," 8 *Marine Policy* (1984), at pp.323-9.

¹⁴⁵ Effective occupation was defined as "a term of art denoting not physical settlement but the actual, continuous, and peaceful display of the functions of a state." Waldock, C.H.M., "Disputed Sovereignty in the Falkland Islands Dependencies," 25 *BYBIL* (1948), at p. 334.

¹⁴⁶ Waldock, *op. cit.*, n.55, at p.137. See also Hurst, C.J.B., "Whose is the Bed of the Sea?" 4 *BYBIL* (1923-24), at p.39. And see below for the difficulty of applying the concept of effective occupation in the Gulf area.

By way of contrast, Lauterpacht stressed his objection to the view of the doctrine of effective occupation as the legal basis of jurisdiction. This concept, he said, could only serve the interest of the industrialized states, who alone could exercise such effective occupation.¹⁴⁷ In the final result, Article 2(3) of the 1958 Convention ruled out the concept of effective occupation as a legal basis for coastal state title over the continental shelf by providing that:

The rights of the coastal State over the continental shelf do not depend on occupation, effective or notional, or on any express proclamation.

(2) *The concept of contiguity*

The doctrine of contiguity or geographical unity has been used as a basis for claiming sovereignty over the sea-bed and subsoil.¹⁴⁸ This contiguity, as Lauterpacht put it, is “to be not contiguity in the accepted sense, i.e. as connoting horizontal prolongation of the already occupied territory, but a different, and apparently more intense, degree of unity—a unity provided by the fact that the shelf is supposed to constitute the base, the platform, on which the continent rests.”¹⁴⁹ Though controversial when first articulated,¹⁵⁰ it was this characteristic of continental shelf right which eventually prevailed.

In the *North Sea Cases*, the World Court in considering the legal basis of jurisdiction over the continental shelf, held that:

the rights of the coastal State in respect of the area of continental shelf that constitutes a natural prolongation of its land territory into and under the sea exist *ipso facto* and *ab initio*, by virtue of its sovereignty over the land, and as an extension of it in an exercise of sovereign rights for the purpose of exploring the sea-bed and exploiting its natural resources. In short, there is here an inherent right.¹⁵¹

¹⁴⁷ Lauterpacht, H., “Sovereignty Over Submarine Areas,” 27 *BYBIL* (1950), at p.420. See below for more discussion.

¹⁴⁸ For example, the Truman proclamation regarded the continental shelf as “an extension of the landmass of the coastal nation and thus naturally appurtenant to it.” The Mexican Declaration of 1945, asserted that: “it is well known, that the land forming the constitute continental plateaux...rests on a submarine platform known as the continental shelf., this shelf clearly forms an integral part of the continental countries.” The proclamation of Abu-Dhabi, 1949, claimed that: “the sea-bed and subsoil...contiguous to the territorial of Abu-Dhabi...appertain to the land of Abu-Dhabi.” See United Nations Legislative Series, *op. cit.*, n.136, at p.13, p.23 and p.38.

¹⁴⁹ Lauterpacht, *op. cit.*, n.147, at p.424.

¹⁵⁰ See for example, Arbitrator Huber remark, in the *Island of Palmas Award*, in respect to the title of contiguity. *The Hague Court Report*, Second Series, Oxford University Press, New York (1932), at p.83. Similarly, see Waldock, *op. cit.*, n.55, at p.120.

¹⁵¹ *North Sea Cases*, at para.19. Similarly, see the *Aegean Sea Case*, at para.86. It is worth quoting here the explanation that Judge Oda gave for the reason why the Court in the *North Sea*

The Court went on to say that:

What confers the *ipso jure* title¹⁵² which international law attributes to the coastal State in respect of its continental shelf, is the fact that the submarine areas concerned may be deemed to be actually part of the territory over which the coastal State already has dominion,—in the sense that, although covered with water, they are a prolongation or continuation of that territory, an extension of it under the sea.¹⁵³

This emphasis by the World Court here and elsewhere on the element of geographical and continuity was to be a major influence on the development of the continental shelf doctrine. Indeed the term natural prolongation, to which we shall refer again, was embodied in Article 77 of the 1982 Convention. Furthermore, this remark by the World Court has stressed the relation between the continental shelf doctrine and the facts of physical geography by introducing the notion of natural prolongation.¹⁵⁴

The doctrine of the continental shelf in the 1958 Convention

The adoption of the continental shelf doctrine at the First UN Conference on the Law of the Sea of 1958 was not a surprise. Rather it was a natural result of the increasing number of coastal states which had claimed a continental shelf area. Moreover, its adoption, as Professor Brown has remarked, was highly desirable since it “would facilitate a secure, regulated, commercial exploitation of the resources of the continental shelf out to depths which, at that time, were regarded as economically exploitable. An interim solution was better than none.”¹⁵⁵

Article 1 of the Convention defined the continental shelf “as referring (a) to the sea-bed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea...; (b) to the sea-bed and subsoil of similar submarine areas adjacent to the coasts of islands.”

Cases used the concept of *ipso facto* and *ab initio*. This was, in his view, “to strengthen the regime of the continental shelf, which had not yet achieved a firm status in international law.” Judge Oda’s dissenting opinion in the *Tunisia v. Libya Case*, at p.191, para. 57.

¹⁵² That is to say “by operation of law.” See 5 *DLR*. 4th (1984), at p.411.

¹⁵³ *North Sea Cases*, at para.43.

¹⁵⁴ *Oppenheim’s, op. cit.*, n.23, at pp.771-8.

¹⁵⁵ Brown, E.D., *The Legal Regime of Hydrospace*, Stevens & Sons, London (1971), at p.14.

The status of this Article is not difficult to ascertain as being part of customary law. The 1958 Convention itself indicated this by prohibiting states from making any reservations regarding Articles 1 to 3 of the Convention.¹⁵⁶ As, the World Court in the *North Sea Cases* noted:

Article 12 of the Geneva Continental Shelf Convention...permits reservations to be made to all the articles of the Convention other than to Articles 1 to 3 inclusive—these three Articles being the ones which, it is clear, were then regarded as reflecting, or as crystallizing, received or at least emergent rules of customary international law relative to the continental shelf...¹⁵⁷

Many scholars, including Brownlie,¹⁵⁸ Churchill and Lowe,¹⁵⁹ have acknowledged the Court's view on this issue.

Article 1 of the 1958 Convention adopted a dual formula¹⁶⁰ for determining the limit of the continental shelf; the 200 isobath or, beyond that limit, to where the depth of the waters is exploitable. The 'exploitability criterion', needless to say, is vague and flexible and for these reasons has become subject to criticism. It is flexible because the rapidly developing technology would give coastal states the opportunity to extend the continental shelf boundary farther and farther out to sea so as to cover the entire ocean floor.¹⁶¹ This fear motivated the introduction of a much more precise legal definition for the continental shelf in the 1982 Convention.¹⁶²

The modern doctrine of the continental shelf

In order to avoid the negative consequences of the depth and exploitability criteria, a legal definition has been employed in the text of Article 76(1) of the 1982 Convention to define the outer limit of the continental shelf.¹⁶³ According to

¹⁵⁶ Article 12 of the Continental Shelf Convention.

¹⁵⁷ *North Sea Cases*, at para.63.

¹⁵⁸ See Brownlie, *op. cit.*, n.119, at p.216.

¹⁵⁹ See Churchill and Lowe, *op. cit.*, n.14, at p.125.

¹⁶⁰ For more discussion of the history of the adoption of this dual formula, see *Ibid.*, at pp.124-6.

¹⁶¹ See in particular the remark of the Secretariat of the United Nations Educational, Scientific and Cultural Organisation, in a memorandum dating from 1957. *UNCLOS I Official Records*, vol. 1, at p.42, para.26. To the same effect, see Brown, *op. cit.*, n.155, at pp.22-3. See also Churchill and Lowe, *op. cit.*, n.14, at pp.125-6.

¹⁶² See below.

¹⁶³ See the remark of Judge Oda on this Article in his separate opinion in the *Greenland v. Jan Mayen Case*, at p.99, para.36 of the opinion. See also Weil, P., *The Law of Maritime Delimitation—Reflections*, Grotius Publications Limited, Cambridge (1989), at p.35.

the Article, the outer edge of the continental margin and the distance criterion would be used to determine the outer limit of the continental shelf up to 200 nautical miles. This distance, which extends from the baseline,¹⁶⁴ was chosen, as we shall see below, because of the parallel development of the concept of the EEZ. States within the EEZ have exclusive sovereign rights over the sea-bed and subsoil up to 200 nautical miles from the baseline. The Court in the *Tunisia v. Libya Case* considered this new development on the legal basis of title to continental shelf as a departure “from the principle that natural prolongation is the sole basis of the title.”¹⁶⁵

Moreover, the fact that the concept of natural prolongation “is an invention of the legal mind, [and] appears not to be a term known to geology, geography or any of the allied sciences,”¹⁶⁶ diminished its importance and viewed it as a cause for confusion on the question of the continental shelf limit.¹⁶⁷ The turning point for the value of the concept of natural prolongation *vis-à-vis* the distance principle came in the World Court judgement in the *Libya v. Malta Case*.¹⁶⁸ The Court in this case stressed that:

since the development of the law enables a State to claim that the continental shelf appertaining to it extends up to as far as 200 miles from its coast, whatever the geological characteristics of the corresponding sea-bed and subsoil, there is no reason to ascribe any role to geological or geophysical factors within that distance either in verifying the legal title of the States concerned or in proceeding to a delimitation as between their claims.¹⁶⁹

It is difficult not to agree with this view. Indeed, a number of leading international jurists have also accepted the 200-nautical-mile continental shelf limit as being part of customary law. O'Connell, for example, asserted that:

Except for the technicalities of delineation, and the granting of sea-bed rights to States with continental shelves narrower than 200 nautical miles, the Draft Caracas Convention [i.e. now

¹⁶⁴ See Figure 2 above.

¹⁶⁵ *Tunisia v. Libya Case*, at para.48.

¹⁶⁶ Jennings, R., “The Principles Governing Marine Boundaries,” *Staat und Völkerrechtsordnung, Festschrift für Karl Doehring* (1989), at p.405.

¹⁶⁷ Brown, E.D., *Sea-Bed Energy and Minerals: The International Legal Regime*, vol. 1, The Continental Shelf, Martinus Nijhoff Publishers, the Netherlands (1992), at p.271.

¹⁶⁸ For evolution of legal title to the continental shelf from natural prolongation to distance principle, see Weil, *op. cit.*, n.163, at pp.33-41.

¹⁶⁹ *Libya v. Malta Case*, at para.39. An opposite view was held by Judge Sette-Camara in his separate opinion in this case; see p.70.

article 76] provisions may be taken to represent the present position in customary international law.¹⁷⁰

Brownlie has similarly stated that:

The general *modus operandi* presented in this provision (200-mile breadth limit or continental margin, whichever is the greater) will probably be recognized as the new standard of customary law.¹⁷¹

However, this is not to suggest that the natural prolongation concept has lost its importance *in toto*, or that it has been “superseded by [the idea] of distance. What it does mean is that where the continental margin does not extend as far as 200 miles from the shore, natural prolongation, which in spite of its physical origins has throughout its history become more and more a complex and juridical concept, is in part defined by distance from the shore, irrespective of the physical nature of the intervening sea-bed and subsoil. The concepts of natural prolongation and distance are therefore not opposed but complementary; and both remain essential elements in the juridical concept of the continental shelf.”¹⁷²

This is so for the inner limit of continental shelf, but what about the case where the outer edge of continental shelf extends beyond 200 miles?¹⁷³ In this case the continental shelf limit would be determined by reference to a highly complex formula.¹⁷⁴ In this formula the notion of natural prolongation has a

¹⁷⁰ O’Connell, *op. cit.*, n.6, at p.497.

¹⁷¹ Brownlie, *op. cit.*, n.119, at p.223.

¹⁷² *Libya v. Malta Case*, at para.34. A similar position was taken by the Tribunal in the *Guinea/Guinea-Bissau Award*, at para.115. For a discussion on the role of natural prolongation on the delimitation process, see also Chapter Three.

¹⁷³ Some here have stressed their doubts on the rights of a coastal state to extend its continental shelf beyond the 200 nautical miles limit, as having the value of customary rules. See for example, Judge Oda, *op. cit.*, n.151, at p.220, para.104; Professor Weil’s dissenting opinion, at p.1215, para.40. See below at p.41 for the view of the Arabic States regarding the extension of the continental shelf beyond the 200 nautical miles.

¹⁷⁴ Where the continental margin extends beyond 200 nautical miles, the outer limit of the continental shelf is a straight line not exceeding 60 nautical miles in length connecting, either (a) the outermost fixed point at each of which the thickness of sedimentary rocks is at least 1 per cent of the shortest distance from such point to the foot of the continental shelf; or (b) fixed points not more than 60 nautical miles from the foot of the continental shelf. Finally, the maximum distance to which the continental shelf can extend is 350 miles or within 100 miles of the 2,500 metre isobath. See Articles 76(3,4,5,6 & 7) of the 1982 Convention. Approximately twenty-seven states, by the end of 1993, defined the outer limit of their continental shelf in terms closely related to the provisions of Article 76 of the 1982 Convention.

significant role to play. The Tribunal in the *Guinea/Guinea-Bissau Award* stated that:

[The] rule for determining the continental shelf by reference to distance, without derogating from the rule of natural prolongation, reduces its scope by substituting it in certain circumstances specified in [paragraph 1] of Article 76 of the 1982 Convention, and through the other provisions of that Article.¹⁷⁵

The juridical nature of the waters superjacent to continental shelf

Article 3 of the Geneva Convention on the Continental Shelf in this regard provides that:

The rights of the coastal State over the continental shelf do not affect the legal status of the superjacent waters as high seas, or that of the air space above those waters.

This Article, mentioned previously, regarded by the World Court in 1969 as part of customary law,¹⁷⁶ preserves the high seas character of the superjacent waters. However, the establishment of the EEZ regime in the 1982 Convention, as we shall see in this next section, has affected that status within 200 nautical miles from the baselines. According to the new trend, the coastal state has sovereign rights up to 200 nautical miles over the sea-bed and the water-column above the sea-bed. It follows that the superjacent water over the sea-bed may no longer be regarded as high seas where other states enjoy the freedoms that are specified in Article 87 of the 1982 Convention. Nevertheless, where the continental shelf extends beyond 200 nautical miles, the water-column over this part retains its high seas character.¹⁷⁷

Coastal state rights in the continental shelf

A coastal state has exclusive sovereign rights¹⁷⁸ for the purpose of exploring and exploiting the natural resources of the continental shelf.¹⁷⁹ In exercising such

¹⁷⁵ *Guinea/Guinea-Bissau Award*, at para. 115.

¹⁷⁶ *North Sea Cases*, at para. 63.

¹⁷⁷ This is because, as we shall see, the maximum limit for the exclusive economic zone is 200 nautical miles.

¹⁷⁸ It follows that a coastal state has no territorial sovereignty rights and the continental shelf remains outside coastal state territory. See Professor O'Connell's argument in the *Aegean Sea Case*, ICJ *Pleadings* 1978, at p.457; *Oppenheim's, op. cit.*, n.23, at p.773; Gilmore, *op. cit.*, n.144, at p.327.

¹⁷⁹ Article 2(1) of the 1958 Convention (now Article 77(1) of the 1982 Convention), and see the Commentary on Article 68, the 1956 ILC report, *ILC Yearbook* (1956), vol.2, at p.253, para.8. It

rights, it must not interfere, unjustifiably, with navigation and other rights and freedoms of other states.¹⁸⁰ Furthermore, the coastal state has no rights beyond the exploring and exploiting of the natural resources and thus non-natural resources, e.g. historic wrecks, are excluded from the coastal states' sovereign rights over the continental shelf.¹⁸¹ Judge Ammoun in his separate opinion in the *North Sea Cases*, stated in respect to coastal states' rights in the continental shelf, that:

The legal content of the sovereign rights remains limited to those acts which are strictly necessary for the exploration, exploitation or protection of the resources of the continental shelf...There would thus be no question, in any case, of sovereignty in the form in which it is exercised over the territorial sea.¹⁸²

The doctrine of the continental shelf in the United Arab Emirates

The Emirates' practice concerning the continental shelf doctrine was one of the earliest in this field, just four years behind the Truman Proclamation of 1945. Thus the Emirates' practice with other state practices has often been cited in the literature of the continental shelf. Here we shall examine this practice, then we shall consider the matter after the creation of the UAE Federation in 1971.

(1) The period prior to 1971

In order to understand the position of the Emirates in claiming the continental shelf, it is necessary first to examine the practice of the British Government in this sphere. This is because the latter in this period was responsible for the conduct of all the foreign affairs of the former, and the matter of claiming the continental shelf naturally fell within the scope of foreign affairs.¹⁸³

The early British view in regard to the sea-bed and subsoil of the sea beyond the three miles territorial sea was that it was *res nullius* (i.e. belonged to no state)

should be noted that Article 2 was regarded as being part of customary law, *North Sea Cases*, at para. 63. See also Professor O'Connell's argument in the *Aegean Sea Case*, ICJ Pleadings 1978, at p. 454.

¹⁸⁰ Article 5(1) of the 1958 Convention (now Article 78(2) of 1982 Convention).

¹⁸¹ Churchill and Lowe, *op. cit.*, n.14, at p.128. For a definition of natural resources, see Article 2(4) of the 1958 Convention (now Article 77(4) of the 1982 Convention).

¹⁸² Judge Ammoun's separate opinion in the *North Sea Cases*, at p.118, para.18. A similar view was held by Professor O'Connell in his argument in the *Aegean Sea Case*, ICJ Pleadings 1978, at pp.458-60.

¹⁸³ For more discussion, see the introduction to this thesis.

and was therefore capable of acquisition by effective occupation.¹⁸⁴ This view was expressed on several occasions by the British Government. For example, Mr. Baxter, a Foreign Office official in a letter, dated November 1938 to the Anglo-Iranian Oil Company, indicated acceptance of this view. He stated that “the subsoil outside the three-mile line is *res nullius* and can be acquired only by effective occupation.”¹⁸⁵ Such effective occupation could be established by, *inter alia*, erecting artificial constructions and derricks.¹⁸⁶ Effective occupation, in addition, was the basis for the various littoral states in the Gulf¹⁸⁷ possessing rights over pearl fisheries in the region.¹⁸⁸ This took the form of asserting the exclusive right to exploit the bank, and preventing foreign fishermen from fishing in the area.¹⁸⁹ Brown wrote regarding the pearl bank in the Gulf that:

¹⁸⁴ The superjacent waters, in contrast, were considered as *res communis* and incapable of acquisition by any nation. See Jewett, M.L., “The Evolution of the Legal Regime of the Continental Shelf, Part II,” *CYIL* (1985), at p.202.

¹⁸⁵ Public Record Office, Foreign Office Papers, FO. 371 21896 E7138/201/34. This position held by the British Government was consistent with its policy toward pearl and sponge fisheries in the Gulf and elsewhere. See Jewett, *Ibid.*, at p. 202. See also below.

¹⁸⁶ Public Record Office, Foreign Office Papers, FO. 371 21896 E7138/201/34.

¹⁸⁷ Brown in his Article “The Pearl Fisheries of the Persian Gulf” referred to scholars who dated the beginnings of the inhabitants of the Gulf States engagement in Pearl Fishing at about 2000 BC. See Brown, R. in 5 *The Middle East Journal* (1951), at p.161. See also *Abu-Dhabi Arbitration*, at p.155; Peter Macalister-Smith, “Pearl Fisheries,” 11 *EPIL* (1989) at pp.256-8; Hurst, *op. cit.*, n.146, at p.43.

¹⁸⁸ The Political Resident in the Gulf described the pearl banks’ locations in the Gulf in his letter on 22 November 1936, to His Majesty's Ambassador in Tehran, in which he said: “The pearl banks are scattered all down the Arab coast from Kuwait to Res Masandam, very roughly speaking, on the side of a line drawn down the middle of the Gulf. Almost all of these banks are situated on the high seas, though a few of minor importance are within the territorial waters of various Arab Sheikdoms.” Public Record Office, Foreign Office Papers, FO.371 20040 E7681/12/34.

¹⁸⁹ See, for example, Political Resident’s inquiry about the possibility of informing the Iranian Government “that His Majesty’s Government regard the pearl banks as the property of the Arabs of the sheikdoms of the Arab littoral and the therefore permission for [any] investigation on these banks should be obtained through His Majesty’s Government from the Shaiks concerned.” Letter from the Political Resident in the Gulf on 22 November 1936 to British Ambassador in Tehran, “regarding the investigation of Persian fishing waters by a Danish vessel.” Public Record Office, Foreign Office Papers: FO.371 20040 E7681/12/34. In a similar manner, the Foreign Office discussed a proposal that the littoral Arab States in the Gulf needed to issue proclamations in which they would state that the fisheries had been reserved for “their nationals, and that other persons had always been forbidden to fish there by law.” See the letter from the Foreign Office to India Office, 11 February 1938 respecting encroachment by foreigners on the pearl fisheries in the Persian Gulf. Public Record Office-Foreign Office Papers: FO.371 21812 E48/48/91.

The right to the Persian Gulf pearl fisheries are jealously guarded by the Arabs, and these rights have been backed up by the British Government for over a hundred years. They are limited to the inhabitants of the Gulf littoral.¹⁹⁰

The implementation of the effective occupation theory was not, however, free from obstacles. The fear was that it would be difficult in the light of this theory to exclude State A from establishing a prior occupation off the coast of State B, especially if State A was a powerful state with the means to establish such occupation.¹⁹¹ This danger led the British government to seek a solution whereby the right of a coastal state to occupy the sea-bed and subsoil off its coast was exclusive, and thus third states would have no right to establish a prior occupation off the coastal state's coastline. Such a suggestion, however, was thought to be very dubious and liable to cause a breach of the rules of international law,¹⁹² unless it was based on the ground that a coastal state would have *ipso jure* rights over the shelf, and not a new acquisition.¹⁹³ This justification, however, was neither preferred by the British Cabinet nor by the United States government. The reason lay, so far as the Gulf area was concerned, in the fear of giving the oil companies who had existing oil concession agreements in the Gulf, room for arguing for an automatic extension to their agreements to cover the sea-bed of the shelf.¹⁹⁴ The *ipso jure* doctrine, therefore, was not supported by them. Lord Asquith in the *Abu-Dhabi Arbitration*,¹⁹⁵ although reaching a conclusion which

¹⁹⁰ Brown, *op. cit.*, n.187, at p.171.

¹⁹¹ See Jewett, *op. cit.*, n.184, at p.202.

¹⁹² *Ibid.*, at p.209.

¹⁹³ Draft despatch from the Foreign Office to H.M. Ambassador, Washington (Lord Inverchapel), 4 February 1948, Public Record Office Document No.E1478/276/91.

¹⁹⁴ Jewett, *op. cit.*, n.184, at pp.213-5.

¹⁹⁵ This Arbitration, it will be recalled, arose between Abu-Dhabi and Petroleum Development (Trucial Coast) Ltd. in 1951. The two parties concluded an oil concession agreement in 1939 whereby the latter would have the right to drill in the former area. Abu-Dhabi, by a proclamation in 1949, asserted its jurisdiction and control over the sea-bed and subsoil area outside its territorial sea limit. In 1950 the Superior Oil Company obtained from Abu-Dhabi a new concession to drill in the Abu-Dhabi shelf area. The Petroleum Development company disputed Abu-Dhabi's right to grant such a new concession on the ground that the sea-bed and subsoil outside Abu-Dhabi's territorial sea were already included in the 1939 agreement. Thus the Ruler of Abu-Dhabi had no right to give the Superior Oil Company a new concession. The Ruler of Abu-Dhabi rejected the plaintiff's claim on the ground that the 1939 agreement was limited to the land of Abu-Dhabi and not to the offshore area. Lord Asquith found that the dispute between the two parties was centred, as far as the shelf area was concerned, on the question whether the sea-bed and subsoil was *res nullius* and thus capable of acquisition by effective occupation, "Or is the

was in fact in general agreement with the British and the American positions,¹⁹⁶ found that the *ipso jure* doctrine could facilitate a good and convenient solution for recognizing the right of a coastal state in the shelf area as exclusive.¹⁹⁷

Britain and America, after ruling out the possibility of suggesting the *ipso jure* doctrine as a basis for a coastal state's claim of sovereignty over the continental shelf, agreed—in principle—on the need to advise the Gulf States to issue proclamations to assert jurisdiction (in the US view), or sovereignty (in the British view),¹⁹⁸ over the continental shelf area adjacent to their coasts. This Anglo-American disagreement was eventually resolved in favour of the US government formula. In a memorandum by the Secretary of State for Foreign Affairs, entitled 'Sea-bed Oil in the Persian Gulf' of 10 February 1949, he wrote that:

We should join with the United States Government in advising the Saudi Arabian Government to extend its Jurisdiction over the sea-bed outside territorial waters...and... we must at the same time inform all our protected rulers in order that they might be ready to take early action to stake their own claims in a similar manner.¹⁹⁹

This, however, should not be taken to mean that the British government had modified its early understanding regarding the rights of coastal states over the sea-bed and subsoil outside the territorial sea limit. An effective occupation was still felt to be required in order to obtain a valid title over the sea-bed and subsoil

position, as the claimant's main argument maintains, that the rights in the subsoil of the shelf adhere...*ipso jure* to the contiguous coastal power?" See *Abu-Dhabi Arbitration*, at p.155.

¹⁹⁶ That an oil-concession agreement which had concluded in 1939, could not be regarded as including the shelf area, over which a coastal state asserted sovereignty at a later stage. This conclusion was based on the fact that the continental shelf doctrine did not exist in 1939. See the Award at p.152, and see also p.155, p.158 and p.160.

¹⁹⁷ By way of contrast, Lord Asquith expressed his worry about the theory of effective occupation, because it "entails obvious and grave dangers so far as occupation is possible at all." See *Abu-Dhabi Arbitration Award*, at p.156.

¹⁹⁸ The British Foreign Office in a telegram to the State Department in Washington on 26 June 1948, remarked that

"I cannot understand how jurisdiction can legally be obtained over something which is *res nullius* at the moment except as the result of the annexation, and such annexation means a claim of sovereignty over it. I do not see how in these circumstances jurisdiction without sovereignty can be obtained, and I have always regarded the Truman Declaration as in fact meaning that the United States had annexed and thereafter claimed sovereignty over the subsoil of their continental shelf." Foreign Office papers, Document No. FO. 371 E8192/276/91.

¹⁹⁹ Foreign Office papers, Document No. E2170/127/91. For an explanation of the meaning of this British support for the Truman Proclamation, see Jewett, *op. cit.*, n.184, at p.222.

of the area adjacent to a state coast.²⁰⁰ Indeed the Gulf States exercised such an occupation over the shelf area. This exercise had been asserted by way of granting exploitation leases and exploration permissions.²⁰¹

On various dates in June 1949, the Gulf States issued identical proclamations to assert jurisdiction and control over the areas of sea-bed and subsoil adjacent to their coasts and beyond the territorial sea limit.²⁰² The Abu-Dhabi Proclamation, 10 June 1949, may be cited as an example. The Ruler of Abu-Dhabi in this Proclamation recited that

We, Shakhbut bin Sultan bin Sa'id, Ruler of Abu-Dhabi, hereby proclaim that the sea-bed and subsoil lying beneath the high seas in the Persian Gulf contiguous to the territorial waters of Abu-Dhabi and extending seaward to boundaries to be determined more precisely, as occasion arises, on equitable principles, by us after consultation with the neighbouring states,²⁰³ appertain to the land of Abu-Dhabi and are subject to its exclusive jurisdiction and control.²⁰⁴

(2) The period after 1971

In 1993 the UAE reclaimed its sovereign rights over the shelf area adjacent to its coasts in the Arabian Gulf and the Gulf of Oman. Article 17 of the Federal Law reads:

Subject to Articles 23(2) and 24 of this law, the continental shelf of the State comprises the sea-bed and subsoil of the submarine areas extending beyond its territorial sea and considered a natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance.

The provision of Article 17 is obviously derived from the provisions of Article 76(1) of the 1982 Convention. It is also reflective of the position of the Arab states at the Third UN Conference on the Law of the Sea during which they opposed the extension of the continental shelf limit beyond the 200 nautical miles

²⁰⁰ See Waldock, *op. cit.*, n.55, at p.135. A similar conclusion was reached by Jewett, *op. cit.*, n.184, at p.216.

²⁰¹ The exploitation leases and exploration permission were two of the four measures which the USA government used to exercise its jurisdiction over the continental shelf. See Brown, *op. cit.*, n.155, at p.19.

²⁰² See above for more discussion on the Emirates' territorial sea limit at this period.

²⁰³ So, "until agreements have been reached, this claim [has] no certain boundaries." Waldock, *op. cit.*, n.55, at p.134.

²⁰⁴ See United Nations Legislative Series, *op. cit.*, n.136, at p.23.

from the baseline.²⁰⁵ This objection refers to the fact that the geographically disadvantaged features of the continental shelf in the Arabic States, with the exception of Oman, Somali, Yemen, Mauritius and Morocco where the continental shelf might extend beyond the 200 nautical miles limit, makes the extension of the continental shelf in these states impossible over a long distance. Therefore, they were in favour of limiting the maximum area of national jurisdiction over the continental shelf to 200 nautical miles, thereby maintaining a greater area to be available for inclusion in the common heritage of mankind.²⁰⁶

Article 18 of the Federal Law gives the UAE government sovereign rights over the continental shelf for the purpose of exploring it and exploiting its natural resources. These rights were described as being exclusive to the UAE, and not dependent on occupation or any express proclamation. Paragraph two of the Article elaborates on the meaning of natural resources. The two paragraphs of Article 18 thus reproduce Articles 77 and 80 of the 1982 Convention.²⁰⁷

As a necessary consequence of the right of exploration of natural resources, the Federal Law gives the UAE government in Article 20 the right to contract, operate and use artificial islands and offshore installations and to establish safety zones around these artificial islands and installations. Similarly Article 20 repeats, in general, the provisions of Article 60 paras. 1, 2, 4 and 5 of the 1982 Convention.

²⁰⁵ See *UNCLOS III Official Records*, vol. 14, at p.25. It must be mentioned that the objection of the extenuation of the continental shelf beyond 200 nautical miles came not only from the Arab States, but also from other states such as the former Yugoslavia. See *UNCLOS III Official Records*, vol. 14, at p.148.

²⁰⁶ For more details, see Dahak, D., *Al Msalh al Arbih fi qanwn al Bhara al Jdiid* (Arab Interests in the New Law of the Sea) Lecture delivered at the UAE Foreign Ministry, Abu-Dhabi, 17 February 1987. Publicised in a *Collection of the work of the 15th Diplomatic Symposium* organized by the UAE Ministry of Foreign Affairs, Abu-Dhabi, (1987).

²⁰⁷ The Federal Law imposes a punishment for any violation of the provision of Article 18. This punishment, according to Article 26(2) would be, in addition to a fine, imprisonment for a term of not less than three years and not exceeding five years. See also Section Four below.

Section Four

The Exclusive Economic Zone

Development of the concept

The protection of coastal state fishery interests was one of the principal measures behind the insistence of some states on a wider territorial sea limit.²⁰⁸ This was, as noted above, to secure preferential rights over the fisheries resources off the coasts of these states. An example of this claim is the Declaration of Santiago of 1952. In it the signatory states, namely Chile, Ecuador and Peru, declared that:

each of them possesses sole sovereignty and jurisdiction over the area of sea adjacent to the coast of its own country and extending not less than 200 nautical miles from the said coast.²⁰⁹

The Latin American states' 200 nautical miles territorial sea limit was not acceptable to some states, including the United States.²¹⁰ At the same time, a claim for establishing a conservation fishing zone with less coastal state power and less breadth was advanced by other states.²¹¹ The latter claim was said to be established in customary law as far as it did not exceed a 12-nautical-mile limit.²¹² In 1970 nine of the Latin American states²¹³ formulated the Montevideo Declaration on the Law of the Sea. This declaration was seen as a step toward reconciliation between the territorial sea claims and the fishing zone claims. In it the participant states claimed a 200-nautical-mile zone involving "sovereignty

²⁰⁸ Similarly, the desire to assert an exclusive jurisdiction over fishery resources on the water above the continental shelf was one of the elements which characterized the continental shelf proclamations of some Latin American Countries. See Section One and Three above for discussion on these claims.

²⁰⁹ Printed in Whiteman, *op. cit.*, n.25, at p.1090. See also *Oppenheim's, op. cit.*, n.23, at pp.785-8.

²¹⁰ For comprehensive detail of the historic background of the concept of the EEZ, see O'Connell, *op. cit.*, n.6, at pp.552-63; Attard, D.J., *The Exclusive Economic Zone in International Law*, Clarendon Press, Oxford (1987), at pp. 1-30; *United Nations Convention on the Law of the Sea 1982: A commentary*, vol. II, Nandan S and Rosenne S. (eds.), Martinus Nijhoff Publishers, the Netherlands (1993), at pp.493-510.

²¹¹ E.g. The Truman Fisheries Proclamation of 1945.

²¹² *Fisheries Jurisdiction Case*, (UK v. Iceland), at para.52; *Fisheries Jurisdiction Case* (Federal Republic of Germany v. Iceland), at para.44.

²¹³ Brownlie, *op. cit.*, n.119, at p.208.

and jurisdiction to the extent necessary to conserve, develop and exploit the natural resources of the maritime area adjacent to their coasts, its soil and its subsoil.”²¹⁴ Nothing in this declaration could affect the freedom of navigation and overflight.²¹⁵

The idea of a “patrimonial zone”²¹⁶ or “economic zone”²¹⁷ instead of a territorial sea zone was beginning to develop. In 1971, for example, the concept of the EEZ was expressed by some states in the Asian-African Legal Consultative Committee at Colombo.²¹⁸ One year later Kenya presented a paper to the Committee containing the first attempt to articulate the EEZ regime.²¹⁹ The idea of the EEZ was supported by many states in the Asian-African Legal Consultative Committee. Nevertheless, the committee failed to come up with any declaration in relation to this matter.²²⁰ At the Third United Nations Conference on the Law of the Sea, the idea of the EEZ again received general agreement and support.²²¹

Notwithstanding these developments in 1974, the validity of an Icelandic Regulation of 1972—prohibiting foreign vessels from fishing within 50 nautical miles around the Icelandic coast—was challenged before the World Court by Britain²²² and West Germany.²²³ The Court found the decision in question not opposable to the Applicant States.²²⁴ Iceland, however, the Court emphasized,

²¹⁴ Nordquist *et al.* (eds), *New Directions in the Law of the Sea*, published by The British Institute of International and Comparative Law, vol.1, Oceana Publications Inc., Dobbs Ferry, New York (1973) at p.235.

²¹⁵ *Ibid.*, at p.236.

²¹⁶ The term was used in the Declaration of Santo Domingo, 9 June 1972, see *Ibid.*, at p. 247.

²¹⁷ The term was used in the Yaoundé Seminar of African States, Recommendations, 30 June 1972; *Ibid.*, at p.250.

²¹⁸ Attard, *op. cit.*, n.210, at p.21.

²¹⁹ *Ibid.*, at pp.22-3. See also Churchill and Lowe, *op. cit.*, n.14, at p.134.

²²⁰ Attard, *op. cit.*, n.210, at p.22.

²²¹ Nonetheless, with regard to the Arabian Gulf, Mr. Al-Qadhi, the Iraqi delegate stated that: “the concept of the economic zone or patrimonial sea should not be applied to semi-closed seas, where it was vitally important to recognise the rights of all the States in the area.” See *UNCLOS III Official Records*, vol. 6, at p.148.

²²² *Fisheries Jurisdiction Case (UK. v. Iceland)* of 1974.

²²³ *Fisheries Jurisdiction Case (Federal Republic of Germany v. Iceland)* of 1974.

²²⁴ *Federal Republic of Germany v. Iceland Case*, at para. 59; *UK. v. Iceland Case*, at para.79.

was entitled to “claim preferential rights ²²⁵ in the distribution of fishery resources in adjacent waters.”²²⁶

The EEZ in the 1982 Convention

Not surprisingly, the 1982 Convention adopted the EEZ regime as a compromise solution “between those states seeking a 200 mile territorial sea and those wishing a more restricted system of coastal state power.”²²⁷ Article 55 reads:

The exclusive economic zone is an area beyond and adjacent to the territorial sea, subject to the specific legal regime established in this Part, under which the rights and jurisdiction of the coastal State and the rights and freedoms of other States are governed by the relevant provisions of this Convention.

The breadth of the EEZ can be extended up to 200 nautical miles from the baselines from which the breadth of the territorial sea is measured.²²⁸ The new Zone is “subject to the specific legal regime”, which is neither high seas nor territorial sea, but *sui generis*, in the sense that the EEZ is a zone in which a coastal state has rights and other states have rights as well.²²⁹ Now we shall provide a brief overview of these different rights in turn.

(1) A coastal state’s rights in the EEZ

A coastal state has sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, both living and non-living, in the waters superjacent to the sea-bed and of the sea-bed and its subsoil, and with regard to the other activities for the economic exploitation of the zone. Moreover, the coastal state has jurisdiction in regard to: (a) the establishment and use of artificial islands and installations; (b) regulating, authorizing and conducting marine scientific research; (c) the protection and preservation of the

²²⁵ For the status and the conditions of preferential rights in customary law, *Federal Republic of Germany v. Iceland Case*, at paras. 44, 47-53. Also, for the difference between the preferential rights and the concept of fishing zone, see *Ibid.*, at para.54; *Oppenheim’s, op. cit.*, n.23, at p.788.

²²⁶ *The Federal Republic of Germany v. Iceland Case*, at para.59.

²²⁷ Shaw, *op. cit.*, n.23, at p.359.

²²⁸ Article 57 of the 1982 Convention.

²²⁹ Attard, *op. cit.*, n.210, at p.67.

marine environment.²³⁰ The coastal state in exercising these rights “shall have due regard to the rights and duties of other states.”²³¹

(2) The rights of other states in the EEZ

Other states enjoy in a coastal state EEZ the freedom of navigation, overflight, laying of submarine cables and pipelines,²³² and other internationally lawful uses of the sea related to these freedoms.²³³ Furthermore, the right of hot pursuit is guaranteed for all states in the EEZ.²³⁴ Moreover, the land-locked and geographically disadvantaged states are entitled to have access to the coastal state’s surplus allowable catch of the EEZ’s living resources.²³⁵ When exercising these freedoms, Article 56 of the 1982 Convention and other related Articles imposed on other states the following restrictions:

- (a) A coastal state may exercise legislative and enforcement jurisdiction to protect and preserve the marine environment. Consequently, foreign ships or aircraft should comply with the coastal state’s pollution regulations, as far as these regulations are consistent with international rules and standards.²³⁶ So, a breach of such regulations will bring the foreign ship or aircraft under the jurisdiction of the coastal state.²³⁷
- (b) The rights of coastal states to construct artificial islands and installations may affect navigation in the EEZ, by forcing ships to use sea-lanes during its passage in the EEZ. Similarly, these installations may prevent aircraft from low flying in the vicinity of such structures and installations.
- (c) The delineation of the course for the laying of pipelines and the conduct of marine scientific research is subject to the consent of coastal state.²³⁸

²³⁰ Article 56 of the 1982 Convention.

²³¹ Article 56(2) of the 1982 Convention.

²³² See the remark of Churchill and Lowe, *op. cit.*, n.14, at pp. 142-3.

²³³ Article 58(1) of the 1982 Convention.

²³⁴ Article 111(3) of the 1982 Convention. See also Churchill and Lowe, *op. cit.*, n.14, at p 173.

²³⁵ Article 62(2) of the 1982 Convention.

²³⁶ Article 211 of the 1982 Convention. See also Attard, *op. cit.*, n.210, at pp. 94-106.

²³⁷ Article 56(1)(b)(III) of the 1982 Convention.

²³⁸ Article 79(3) of the 1982 Convention. Churchill and Lowe remarked that: “Although this article is in the part of the Law of the Sea Convention dealing with the continental shelf, it must also apply to the EEZ, since the sea-bed of the EEZ is coterminous with the continental shelf.”

(d) Article 58(3) obliges other states when exercising their rights in a coastal state's EEZ to: "have due regard to the rights and duties of the coastal state and comply with the laws and regulations adopted by the coastal state in accordance with the provisions of this Convention and other rules of international law."

These restrictions on the rights of third states in the EEZ require the conclusion that: "the rights of other states to navigate, overfly and lay cables and pipelines in a coastal state's EEZ are less extensive than their corresponding rights on the high seas."²³⁹ Furthermore, if a conflict arises between interests of the coastal state and any other state's or states's interests regarding a matter not mentioned in the 1982 Convention, such conflict—according to Article 59—should be resolved on the basis of equity and in the light of all the relevant circumstances.

The EEZ in customary law

As a result of the wide support for the EEZ regime in state practice, there is a nearly unanimous view that it has become part of the rules of customary law. For example, the World Court in the *Tunisia v. Libya Case* stated that the EEZ "may be regarded as part of modern international law."²⁴⁰ In similar vein it held in the *Libya v. Malta Case* that the "institution of the exclusive economic zone...is shown by the practice of States to have become part of customary law."²⁴¹ As Shaw has explained: "A wide variety of states have in the last decade claimed exclusive fishing or economic zones of 200 miles. It would appear that such is the number and distribution of these states, that it is possible to talk of the establishment of a rule of customary law regarding the zones."²⁴² In a similar manner, Churchill and Lowe wrote that: "The number of claims to an EEZ,

Churchill and Lowe, *op. cit.*, n.14, at pp.142-3. See also Article 56(b)(II) of the 1982 Law of the Sea Convention.

²³⁹ Churchill and Lowe, *op. cit.*, n.14, at p.143.

²⁴⁰ *Tunisia v. Libya Case*, at para. 100. See also *Gulf of Maine Case*, at para. 94.

²⁴¹ *Libya v. Malta Case*, at para.34.

²⁴² Shaw, *op. cit.*, n.23, at p.362.

coupled with an almost complete absence of protest, strongly suggests that the right to a 200 mile EEZ has now become part of customary international law.”²⁴³

However, the practice favouring the EEZ was not universal. Some states, such as the United Kingdom, Japan, Canada, Saudi Arabia, Qatar, and Denmark, claimed an EFZ instead of claiming an EEZ. The reason behind the more limited claim was that “a 200 mile EFZ, together with the exclusive rights over the sea-bed resources which they already have under the continental shelf regime, give these States all that they at present want from an EEZ. They are less certain about the other principal rights of the coastal State in the EEZ—the regulation of research and pollution control—and at the time they made their claims to a 200 mile EFZ (in 1977 in most cases) preferred not to prejudice negotiations at UNCLOS over the content of coastal State jurisdiction over pollution and research by claiming such jurisdiction themselves. It is also noteworthy that a number of States which originally claimed a 200 mile EFZ in 1977 or so, e.g. Senegal, the USSR and the USA, have subsequently changed their claim to an EEZ.”²⁴⁴

The relationship between the EEZ and the continental shelf regime²⁴⁵

The sea-bed and subsoil of the sea adjacent to the territorial sea, as we have seen, were initially subject to the continental shelf regime. Coastal states thereby acquired sovereign rights over the natural resources in the sea-bed and subsoil. The superjacent waters were in no way affected, and they retained their high seas character. However, a new development in international law, as noted above, has made the water-column above the continental shelf area, together *with its sea-bed and subsoil*, subject to the exclusive sovereign rights of the coastal state up to 200 miles from the baselines. The emergence of the new regime raises the question of

²⁴³ Churchill and Lowe, *op. cit.*, n.14, at p.146. To the same effect, see Attard, *op. cit.*, n.210, at p.308. See also *Oppenheim's*, *op. cit.*, n. 23, p.789. Judge Oda, with regard to the acceptance of the EEZ into customary law, wrote that: “Throughout the history of international law, scarcely any other major concept has ever stood on the threshold of acceptance within such a short period.” Judge Oda, *op. cit.*, n.151, at p.228, para.120.

²⁴⁴ Churchill and Lowe, *op. cit.*, n.14, at p.145.

²⁴⁵ For more discussion on the relation between the two concept, see Evans, M., “Delimitation and the common Maritime Boundary,” 64 *BYBIL* (1993), at pp.286-93.

whether or not the continental shelf regime has been incorporated into the regime of the EEZ. However, before we can give an appropriate answer to this question, it is of value to mention some important differences between the two regimes in respect of: (1) coastal state rights in establishing the EEZ and the continental shelf; (2) the outer limit of the two zones. Each of these two points will be discussed in turn.

(1) Coastal state rights in establishing the EEZ and the continental shelf

Whereas the rights of a coastal state, as mentioned earlier in this study, over the continental shelf area exist *ipso facto* and *ab initio*, and do not depend on occupation or proclamation, the rights of a coastal state over the EEZ arise differently. This difference is reflected in the fact that there is no inherent or automatic right here as far as the superjacent waters are concerned, and “an express claim is necessary for the existence of the exclusive economic zone.”²⁴⁶ This necessity stems from state practice, and not from the 1982 Convention—which remains silent, and the issue is left to coastal state to claim such a zone.²⁴⁷

The difference between the case where there is an inherent right and the case where there is not is that where coastal states do not explore the continental shelf or exploit its natural resources, within the continental shelf limit, no one may undertake these activities. This is because coastal states, according to Article 77, have inherent rights over the natural resources of the continental shelf. Where there is no inherent right, if a coastal state fails to claim exclusive rights over the

²⁴⁶ See Sette-Camara’s separate opinion in *Libya v. Malta Case*, at p.70. Some states have chosen not to claim an EEZ or to restrict their claim in establishing an EEZ in respect to some part of their coasts. See, for example, Article 1 of the final provisions of the Spanish Law of 1978. Some other states, e.g. Guyana, did not establish an EEZ but gave the President of Guyana the rights to do so, if he should consider it necessary to establish such a zone. See Article 15 of the Maritime boundaries Act of 1977, see UN Legislative Series, *National Legislation and Treaties Relating to the Law of the Sea*, New York (1980), at p.37.

²⁴⁷ Sette-Camara, *op. cit.*, n.246, at p.70; Kwiatkowska, B., “Judge Shigeru Oda’s opinions in Law-of-the-Sea Cases: Equitable Maritime Boundary Delimitation,” 36 *German Yrbk* (1993), at p.242; Attard, *op. cit.*, n.210, at pp.54-81; Chiu, H., “The Problem of Delimiting the Maritime Boundary between the Exclusive Economic Zone and the Continental Shelf of Opposite States,” *Essays in Honour of Wang Tieya*, Macdonald J. (ed.), Martinus Nijhoff Publishers, Dordrecht, the Netherlands (1994), at p.185.

water-column within 200 miles, the water area will retain its high seas character. Therefore all states are free to exploit it.

(2) The outer limit of the continental shelf and the EEZ

In the case of the EEZ the outer limit of the zone may not extend beyond the 200 miles limit. The case, however, is different with respect to the continental shelf. Article 76 of the 1982 Convention provides that the continental shelf may extend throughout the natural prolongation of the land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles where the outer edge of the continental margin does not extend up to that distance. But where it does so extend, the continental shelf may follow this extension up to 350 nautical miles as a maximum limit.²⁴⁸ In short, the difference between the two cases is that whereas distance is the only criterion whereby the breadth of the EEZ is determined, the natural prolongation and the distance criteria may have a role to play in determining the breadth of the continental shelf.²⁴⁹

Now we turn to the question which we posed regarding the incorporation of the continental shelf regime into the EEZ regime. A distinction needs to be drawn here between the inner limit of the continental shelf up to 200 nautical miles and the area beyond. As far as the inner limit is concerned, some international jurists, including Judge Oda, suggested that the continental shelf is in the process of being incorporated into the EEZ regime. The provision of Article 56(3) of the 1982 Convention should, he argues, be “interpreted to mean that the regime of the exclusive economic zone [incorporates], in principle, the whole regime of the continental shelf.”²⁵⁰ Judge Aréchaga has expressed a similar opinion. He stated:

it is difficult to deny that, at least in the case of continental shelves not extending beyond 200 miles, the notion of the continental shelf is in the process of being assimilated to, or incorporated in that of the Exclusive Economic Zone.²⁵¹

²⁴⁸ See also above, at p.33.

²⁴⁹ See in this regard the remarks of Brown, *op. cit.*, n.167, at p. 352.

²⁵⁰ Judge Oda, *op. cit.*, n.151, at pp.233-4, para.130. Article 56(3) of the Law of the Sea Conventions reads: “The rights set in this article with respect to the sea-bed and subsoil shall be exercised in accordance with Part VI [i.e. continental shelf regime].” See below.

²⁵¹ Judge Aréchaga’s separate opinion in the *Tunisia v. Libya Case*, at p.115, para. 55.

By way of contrast, other jurists have declined to accept such an argument. Judge Gros, for example, in his dissenting opinion in the *Gulf of Maine Case*, held that:

What is left of the legal unity of maritime spaces and of the idea that the continental shelf should be merged with the zone, if the last paragraph of Article 56 defining the zone refers back to Part VI for another definition of the continental shelf element not contained in Article 77, and why should there be two articles on a delimitation defined in one and the same way? The construction of the Treaty with a Part V (*Exclusive Economic Zone*) and a Part VI (*Continental Shelf*) only makes sense if the two areas differ in certain ways, to such an extent that it was necessary to devote to them two parts of a convention on the law of the sea.²⁵²

He further states that:

It scarcely makes sense to eliminate the continental shelf within the Gulf by assimilating it to the water column, when the final part of it will remain to be delimited and will be treated as a specific area of shelf as from the 200-mile line where the water will cease to be a factor.²⁵³

Were it to be correct that the inner limit of the continental shelf up to 200 nautical miles has been incorporated into the EEZ, it would not mean that the boundary line of the two areas ought not to be different. A possible single boundary line and the rules of the continental shelf and the EEZ boundary delimitation will be discussed in detail in Chapter Three. In the present context, it is sufficient to note that a single boundary line is desirable from a practical point of view. It is not, however, a necessary result. This is because the concept of a single maritime boundary line “has not been established in either customary international law or treaty law.”²⁵⁴ Therefore it is possible to have a separate line for each zone.²⁵⁵ Indeed the Tribunal, in the *Guinea-Bissau/Senegal Award* of 1989,²⁵⁶ confirmed the possibility of having a different line for the two concepts,

²⁵² Judge Gros’s dissenting opinion in the *Gulf of Maine Case*, at p.374 para. 21.

²⁵³ Ibid., at p.376, para. 23. It is worth mentioning here that Judge Oda who supported the opposite view did not regard the right of coastal states to extend their continental shelf beyond the 200 nautical miles as being incorporated into customary law. See Judge Oda, *op. cit.*, n.151, at p.220, para.104.

²⁵⁴ Judge Oda’s remark in *Denmark v. Norway*, ICJ *Verbatim Record of Pleadings*, CR 93/9.83.85. Quoted from Kwiatkowska, *op. cit.*, n.247, at p.276.

²⁵⁵ See Brown, *op. cit.*, n.167, at p.353.

²⁵⁶ The Tribunal, it will be recalled, was in charge of determining whether the 1960 agreement between Portugal and France concerning the maritime boundaries between their colonial territory, (i.e., Guinea-Bissau and Senegal) had any binding force upon the states of Guinea-Bissau and Senegal after they gained their independence. The agreement defined the boundaries of the territorial seas, contiguous zones and the continental shelves. The Tribunal answered the question in the affirmative, but stressed that the 1960 agreement did not determine the boundaries of the two parties’ EEZ, because the EEZ did not exist in 1960. Hence the two parties needed to

and, on the other hand, doubted the incorporation of one regime into another.²⁵⁷ Furthermore, the difference between the two doctrines, regarding the right to establish each of them, their breadth, the right and power of coastal states, their historical development, and the way they are articulated in two parts in the 1982 Convention, may support the autonomy of both institutions.²⁵⁸ Moreover, Judge Oda, who argued in 1982 that the EEZ was in the process of absorbing the continental shelf doctrine, has subsequently acknowledged a separation between the two regimes. For instance, he wrote that:

the two regimes of the exclusive economic zone and the continental shelf exist separately and in parallel in the 1982 United Nations Convention, hence in existing international law, and the delimitation for each is different.²⁵⁹

So much for the inner limit of the continental shelf up to 200 nautical miles. But what about the outer limit of the continental shelf? There is obviously no valid argument with respect to this part of the continental shelf that it may be absorbed by the EEZ regime, since it extends beyond the maximum EEZ limit. Coastal states in the area beyond 200 miles may have a continental shelf, but no EEZ. The water-column above the continental shelf remains high seas. Furthermore, in the outer limit of the continental shelf, the concept of natural prolongation holds sway, since it is the legal basis for coastal states projecting their rights beyond 200 miles.²⁶⁰

The doctrine of the EEZ in the United Arab Emirates

The EEZ was the first maritime zone to be claimed by the Union Authority. This took the form of a declaration by the Ministry of Foreign Affairs in 1980. Article 1 of the declaration reads:

determine *de novo* the boundary between their respective EEZ boundaries. This may lead to the conclusion that the Tribunal believed that it was possible to have one line for the continental shelf and another for the EEZ.

²⁵⁷ *Guinea-Bissau/Senegal*, at para.85.

²⁵⁸ Evans came to a similar conclusion after he examining case law since the mid 1980s. See Evans, *op. cit.*, n.245, at pp.313 and 331.

²⁵⁹ Judge Oda, *op. cit.*, n.163, at p.110, para.73. See also Judge Oda's dissenting opinion in the case concerning the *Arbitration Award of 31 July 1989 between Guinea-Bissau and Senegal*, ICJ Reports 1991, at p.89, para.18. See Evans' analysis of Judge Oda's opinion on this issue: Evans, *op. cit.*, n.245, at pp.317-8.

²⁶⁰ See Article 76(a).

The United Arab Emirates shall have an exclusive economic zone contiguous to its main coast and to the coast of its Islands in the Arabian Gulf and Sea of Oman.²⁶¹

In thus asserting an EEZ the UAE was influenced by the work of the Third UN Conference on the Law of the Sea on the right of coastal states to claim a 200-mile zone of this kind. The outer limit of this zone, according to Article 3 of the declaration, was to be determined “in accordance with the provisions of the agreements concluded by the Emirates members of the Union in connection with their continental shelf.” In the case where no agreement has yet been concluded, the EEZ extends up to the median line, every point of which is equidistant from the baselines. As we shall see in Chapter Four the UAE has so far reached agreements with two neighbouring states, namely Qatar in 1969 and Iran—in respect of a certain part of the continental shelf—in 1974.²⁶²

The rights of fishing by other states, as a natural result of claiming an EEZ, were prohibited within the EEZ without prior permission from the UAE authorities. This permission, according to Article 5, should not be issued except where there is a surplus of fish stocks in the EEZ. In addition, the rights of navigation for other states, and the *status quo* between the member Emirates of the Union with regard to their respective territorial sea areas, are in no way to be deemed to have been affected by the Declaration.

In 1993, in Article 12 of the Federal Law, the UAE government reclaimed its sovereign rights over the sea-bed and superjacent waters that are adjacent to its territorial sea limit to a distance not exceeding 200 nautical miles. Here we must distinguish between this Article and Article 1 of the Ministry of Foreign Affairs’ Declaration of 1980. Article 1 of the Declaration does not suggest any distance criterion to determine the outer limit of the EEZ. Rather it refers to the median line system, in Article 4, as an outer limit, where there is no agreement to the contrary for the EEZ. This being so, the geographical character of the area suggests that the median line formula is more realistic and reflects the true

²⁶¹ Article 4 of the declaration illustrated the sovereign rights which the UAE possesses in the EEZ. See UN Office for Ocean Affairs and the Law of the Sea, *The Law of the Sea, National Claims to Maritime Jurisdiction*, New York (1992), at p.135.

²⁶² For more discussion, see Chapter Four.

geographical circumstances of the area. This is simply because the UAE would not be able to extend its EEZ limit up to 200 nautical miles, since the distance between the two shores in the Arabian Gulf or in the Gulf of Oman, is less than 400 nautical miles.

The rights of the UAE in the EEZ are illustrated in Articles 13 and 14 of the Federal Law which are derived from Articles 56(1) and 52 of the 1982 Convention. There is no essential difference between the two Articles and Article 4 of the Ministry of Foreign Affairs Declaration of 1980.

Article 15 of the Federal Law, like Article 5 of the 1980 Declaration, has reserved the rights of fishing to nationals of the United Arab Emirates. Nonetheless, nationals of other states may have access to the UAE's EEZ, by first obtaining permission from the UAE authorities in accordance with the rules and conditions laid down by the State. Here again, the content of the law is derived directly from the Law of the Sea Convention; in this instance, Article 62(2).

Violation of the provisions of Article 15 may result, according to Article 26(3) of the Federal Law, in imprisonment and a fine. It is of interest to note that there is an apparent conflict between this Article and paragraph 3 of Article 73 of the 1982 Convention. The latter stipulates that "coastal state penalties for violations of fisheries laws and regulations in the EEZ [in the absence of bilateral agreement] may not include imprisonment."²⁶³ Therefore, under the 1982 Convention, punishment would only be a fine. By way of contrast, under the Federal Law there should be two punishments: imprisonment and a fine for violating the provision of Article 15. However, at the present time there would appear to be no violations of international law resulting from the conflict between the two Articles. This is because the UAE is not party to the Convention, and Article 73(3) does not appear to be a codification of a customary law.²⁶⁴

²⁶³ Article 73(3) of the 1982 Convention.

²⁶⁴ It is worth mentioning here that there are a number of states who also contained the punishment of imprisonment for the violation of national fishery regulations. The state Department's Boundary Series, *Limits in the Seas*, listed about 20 States who contained imprisonment punishment in their EEZ laws. This may endorse the argument that Article 73(3) is a progressively developing rule. See *Limits in the Seas*, Series No.112, 9 March (1992), at p.39.

As a necessary consequence of giving the UAE the right to regulate and authorize the exploration, exploitation, conservation and management of the living resources in the EEZ, Article 16 of the Federal Law grants the State enforcement jurisdiction to take the necessary measures to ensure compliance with its laws and regulations. Such measures may include boarding, inspection, arrest and judicial proceedings against vessels. Here again Article 16 reproduced paragraphs 1, 2 and 4 of Article 73 of the 1982 Convention.

Section Five

Regime of Islands

An island has been defined in Article 121(1) of the 1982 Convention as “a naturally formed area of land surrounded by water, which is above water at high-tide.” This paragraph reproduces Article 10(1) of the 1958 Territorial Sea and Continuous Zone Convention. The entitlement of islands to maritime zones is, in principle, on an equal footing to that of other land territory. Article 121(2) of the 1982 Convention states:

Except as provided for in paragraph 3, the territorial sea, the contiguous zone, the exclusive economic zone and the continental shelf of an island are determined in accordance with the provisions of this Convention applicable to other land territory.

This equal entitlement of islands to zones of maritime jurisdictions has been reinforced in case law whenever the question has arisen. For example, in the *Dubai/Sharjah Award*, the Court of Arbitration stressed that “every island, no matter how small, has its belt of territorial sea.”²⁶⁵ Elsewhere, the Court of Arbitration was to remark: “The entitlement of an island, as well as a mainland, to a continental shelf is well established.”²⁶⁶ Furthermore, Article 1(b) of the 1958 Convention on the Continental Shelf provides that the term continental shelf is used to refer to the sea-bed areas adjacent to the coasts of islands. This Article, as has been noted, was said to be regarded as reflecting the rules of customary law.²⁶⁷

²⁶⁵ *Dubai/Sharjah Award*, at p.673.

²⁶⁶ *Ibid.*, at p.675.

²⁶⁷ *North Sea Cases*, at para. 63.

Notwithstanding the assimilation in law between an island and other land territory in the entitlement of maritime zones, an island in some cases might be denied full effect maritime areas.²⁶⁸ This question will be discussed in detail in Chapter Six. Having said that an island is a naturally formed area of land, international law does not, in principle, recognize any effect for artificial islands and technical installations.²⁶⁹ Jessup, in this regard wrote that:

It would be dangerous doctrine in many parts of the world to allow states to appropriate new areas of water by means of structures on hidden shoals.²⁷⁰

Islands and low-tide elevations

Article 13 of the 1982 Convention has defined a low-tide elevation as “a naturally formed area of land which is surrounded by and above water at low-tide but submerged at high-tide.” The difference between an island and a low-tide elevation is that a naturally formed area of land which is surrounded by water would be accounted—according to international law—an island, if above the water at high-tide, and a low-tide elevation, if submerged at high-tide. International law recognizes, in principle, that an island is capable of having maritime zones, and that a low-tide elevation is not. Notwithstanding this fact, Article 13 of the 1982 Convention, nonetheless, gives limited effect to low-tide elevations for the purpose of drawing normal baselines. However, this is subject to the condition that the low-tide elevation should be situated wholly or partly at a distance not exceeding the breadth of the territorial sea from the mainland or an island.

Similarly, in regard to the use of straight baselines, low-tide elevations may be employed as basepoints only if lighthouses or similar installations, which are permanently above sea level, have been built on them; or, the 1982 Convention

²⁶⁸ Bowett, D., *The Legal Regime of Islands in International Law*, Oceana Publications Inc., Dobbs Ferry, New York (1979), at p.34.

²⁶⁹ An exception to this prohibition is that a coastal state, which is in accordance with Article 60(4) of the 1982 Convention, has the right to establish a 500-metre safety zone around these artificial islands and installations.

²⁷⁰ Jessup, *op. cit.*, n.13, at p.69.

adds, where the drawing of baselines to and from such elevation has received general international recognition.²⁷¹

Islands and rocks

A new trend in international practice has been to articulate a distinction between rocks and islands. This distinction is that, in principle, rocks should have no continental shelf or EEZ, whereas islands would continue to generate the full range of normal entitlements. This is reflected in Article 121(3) of the 1982 Convention which states that:

Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf.

Several key questions arise for consideration in this regard. Firstly, what is a rock? Regrettably, Article 121(3) was poorly drafted and does not provide a ready answer. It does not define the term, nor does it “suggest any dividing line between rocks and other islands.”²⁷²

Scholars and international jurists have set out to clarify the meaning of this term.²⁷³ Hodgson, for example, has defined rocks as possessing an area of less than 0.001 square miles.²⁷⁴ The size of the area of the rock as a criterion to distinguish a rock from an island seems to be used by some scholars. Professor Boyle, for example, suggested, that “a rock is smaller than an island”, but (like an island) it is above water at high tide.²⁷⁵ Professor Bowett, on the other hand, attempts to elaborate on the meaning of the phrase “cannot sustain human habitation or economic life of their own” in order to identify a clear definition for

²⁷¹ Article 7(4) of the 1982 Convention.

²⁷² See Churchill and Lowe, *op. cit.*, n.14, at p.41. See also Boyle, A.E., “UNCLOS, ITLOS and the Settlement of maritime Boundary Disputes between Taiwan and Japan,” (unpublished paper) Taiwan, April (1997), at p.1.

²⁷³ A rock was defined in the African proposal to the UNCLOS III as “a naturally formed rocky elevation of ground, surrounded by water, which is above water at high tide.” See UN Document A/conf.62/C.2/L.62/Rev.1. 27/8/1974. *UNCLOS III Official Records*, vol. 3, Documents of the Conference, First and Second Sessions, at p.232.

²⁷⁴ Hodgson, R.D., *Islands: normal and special circumstances*, the Geographer Bureau of Intelligence and Research (1973), at p. 17. for their effect in the boundary delimitation, see at p.43. See Bowett’s remark on the Hodgson classification: Bowett, *op. cit.*, n.261, at p. 44.

²⁷⁵ See Boyle, A.E., “Maritime Boundaries and UNCLOS: Some Current Problems,” (unpublished paper) Greenwich Forum, 30 May (1996), at p.7.

a rock. In this regard, he suggests that the phrase could mean that a rock cannot be considered an island “by injecting an artificial economic life, based on resources from its other land territory,”²⁷⁶ or by expanding, artificially, the area of the “rock and make it habitable.”²⁷⁷ In contrast the Jan Mayen Commission in the Iceland-Norway boundary delimitation, in the view of Kwiatkowska, pointed to the conclusion that the test of capacity to sustain human habitation or economic life of their own “does not necessarily exclude islands obtaining external support for a population that is not necessarily permanent.”²⁷⁸

Secondly, what is the status of Article 121(3) in customary law? It is perhaps not surprising that there is some controversy regarding the status of paragraph 3 of Article 121. Professor Brown, for example, has expressed the view that the Article has passed into customary law.²⁷⁹ By way of contrast, Churchill has concluded that state practice in this field²⁸⁰ is such that it is extremely unlikely that the Article has become part of customary law.²⁸¹

Notwithstanding these differences the Conciliation Commission on the continental shelf area between Iceland and Jan Mayen asserted that Article 121 “reflects the present status of international law on this subject.”²⁸² The commission did not give any evidence to support its statement. Furthermore, the question of whether or not rocks are entitled to a continental shelf and an EEZ,

²⁷⁶ Bowett, *op. cit.*, n.261, at p.34.

²⁷⁷ *Ibid.* For a comprehensive survey of the meaning of a rock, see Kwiatkowska and Soons, “Entitlement to Maritime Areas of Rocks which Cannot Sustain Human Habitation or Economic life of their Own,” 21 *Neths. YIL* (1990), at pp.150-73.

²⁷⁸ Kwiatkowska, B., “Equitable Maritime Boundary Delimitation,” *Fifty Years of the International Court of Justice*, Essays in Honour of Sir R. Jennings, Lowe and Fitzmaurice (eds.), Cambridge University Press, Cambridge (1996), at p. 289; Kwiatkowska, B., “Equitable Maritime Boundary Delimitation, as Exemplified in the Work of the International Court of Justice During the Presidency of Sir Robert Yewdall Jennings and Beyond,” 28 *ODIL* (1997), at p.106. See also the remark of O’Connell, *op. cit.*, n.6, at p.732.

²⁷⁹ Brown, *op. cit.*, n.167, at p.41. A similar view was held by Dolliver Nelson, “The Delimitation of Maritime Boundaries in the Caribbean,” *Ocean Boundary Making, Regional Issues and Development*, Johnston and Saunders (ed.), Croom Helm, London (1988), at p. 174.

²⁸⁰ An example of these practices, in which a rock or a tiny islet was granted continental shelf and the EEZ or EFZ, have been cited in Churchill and Lowe, *op. cit.*, n.14, at p.135. Further examples have been reproduced in Kwiatkowska and Soons, *op. cit.*, n.269, at pp.176-9.

²⁸¹ Churchill, R.R., “Maritime delimitation in the Jan Mayen Area,” 9 *Marine Policy* (1985), at p.20. A similar view was shared by Brownlie, *op. cit.*, n.119, at p.192; Gilmore, *op. cit.*, n.21, at p.21, para.25, at p.21; Kwiatkowska and Soons, *op. cit.*, n.269, at p.175, see also at pp.176-80.

²⁸² Iceland-Jan Mayen Conciliation Commission, 20 *ILM* (1981), at p.803.

was not, in fact, a relevant point to the task of the commission. This was simply because Jan Mayen was too large to be regarded as a rock. (It has an area of 373 square kilometres, and is inhabited.) What was important was that the Commission was to examine Jan Mayen's capacity as an island, in international law, to have its own continental shelf and EEZ limit. If so, is this entitlement on the same footing as that of Iceland?²⁸³

Careful study was not required to answer these questions, since the World Court in the *North Sea Cases* stated that Article 1 of the 1958 Convention on the Continental Shelf (in which "the entitlement of an island, as well as a mainland, to a continental shelf is well established"),²⁸⁴ was a declaratory of customary law.²⁸⁵ The Commission was aware of this fact as being well known, hence it did not give evidence to support its statement. This may lead some to assert that it is hard to accept at face value the statement of the commission with respect to the status of Article 121(3).

Thirdly, how was it applied in state practice? There were inconsistencies in some practices, where a distinction between rocks and islands was alleged. For example, Denmark had disputed the UK claim of continental shelf and Fishery zone for Rockall, since, Denmark alleged, Rockall is a rock within the meaning of Article 121(3) and thus it should have no continental shelf or EFZ.²⁸⁶ Interestingly, in the *Greenland v. Jan Mayen Case*, Denmark while describing Jan Mayen island as a rock within the definition of Article 121(3), "does not argue that Jan Mayen has no entitlement to continental shelf or fishery zones, but that when maritime boundaries are to be established between that island and the territories of Iceland and Greenland, the island of Jan Mayen cannot be accorded full effect, but only partial effect."²⁸⁷

It is evident from the above that the position regarding the meaning of rocks and the status of Article 121(3) is still unsettled. State practice in the coming

²⁸³ Churchill, *op. cit.*, n.273, at p.18.

²⁸⁴ *Dubai/Sharjah Award*, at p. 675.

²⁸⁵ *North Sea Cases*, at para.63.

²⁸⁶ Symmons, C.R., "The Rockall Dispute," 35 *ICLQ* April (1986), at p.348.

²⁸⁷ *Italic added. Greenland v. Jan Mayen Case*, at para. 80.

years may add some clarification to the provision of paragraph 3, or to its value in customary law.

The regime of Islands in the UAE Federal Law

The Federal Law, in Article 1, distinguishes between islands and low-tide elevations. The Article in this regard reproduces Article 121(1) of the 1982 Convention in defining the term ‘island’, and Article 13 of the Convention in defining the term ‘low-tide elevation’. The entitlement to maritime zones, according to Article 19 of the Federal Law, was asserted for islands and not for low-tide elevations. A distinction between an island and rock for the purpose of granting a continental shelf and an EEZ is not recognized in the Federal Law. Hence the UAE, technically, claims a continental shelf and an EEZ for all insular territories whether or not they be regarded as islands or rocks.

Finally, Article 2(2) gives the UAE the right to use low-tide elevations which are situated at a distance not exceeding 12 nautical miles from the mainland or from any island belonging to the State as a basepoint to construct the straight-line system envisaged therein.

Territorial Sea Boundary Delimitation

Territorial Sea Boundary Delimitation

2

We saw in Chapter One that every coastal state is entitled to claim national jurisdiction over various offshore zones. The exact limit of this jurisdiction should logically be defined in order to avoid any overlap with the rights of other states. This is the function of the rules of maritime boundary delimitation which is the subject matter for this and the next chapter. However before we can commence our examination of that issue, a distinction should be drawn, in order to provide an appropriate legal context for analysis, between: (1) boundary disputes and territorial disputes; (2) maritime boundary delimitation and land boundary determination; and, (3) the delimitation of maritime boundaries and the drawing of maritime limits. Furthermore, the entitlement of a coastal state to claim a territorial sea, contiguous zone, continental shelf and EEZ suggest that there might be different rules for the delimitation of each zonal boundary. However, as we have seen, under current developments in international law, the importance of the contiguous zone boundary delimitation has been eliminated.¹ Moreover, the 1982 Convention has provided an identical rule for the delimitation of EEZ and continental shelf boundaries.² Therefore, we shall examine the rules for the EEZ and the continental shelf boundary delimitation in a separate chapter, and the rules of territorial sea boundary delimitation here. The position with regard to the contiguous zone boundary will be discussed briefly within the context of the delimitation of the territorial sea.³ Therefore this chapter

¹ See Chapter One/Section Two.

² This however does not mean that the boundary line of the two areas should coincide: see Chapter Three/ Section One.

³ Unlike Chapter One above there will be no discussion of the rules of delimitation in the UAE Maritime Laws, since that issue will be discussed in some details in Chapters Four and Five of this work.

has been divided into two sections, (1) terminological distinctions; (2) the rules of delimitation for the territorial sea boundary.

Section One

Terminology

Territorial disputes and boundary disputes

A territorial dispute is a conflict which arises when two or more states claim sovereignty over a certain area: in other words it involves a question of title. By way of contrast a boundary⁴ dispute is a conflict which arises “about the locus of a boundary line, not about the existence or not of territorial sovereignty.”⁵ An example of a territorial dispute is that between the UK and Argentina over sovereignty of the Falkland Islands.⁶ On the other hand, the dispute between the UK and France in 1977 in the Channel Islands area can be cited as an example of a boundary dispute, because France did not dispute the UK’s sovereignty over the Channel Islands. The dispute was, *inter alia*, over the course of the maritime boundaries between the English coast and the French coast.⁷

However, it is not always simple to draw a clear distinction between a territorial dispute and a boundary dispute, since both are part of the general question of territorial sovereignty, which is, as Judge Huber the arbitrator in the *Island of Palmas* suggested: “a situation recognized and delimited in space, either by the so-called natural frontiers as recognized by international law or by outward signs of delimitation that are undisputed, or else by legal engagements entered

⁴ For a definition of the term “boundary”, see the commentary of the ILC report of 1982 on the Law of Treaties Concluded between States and International Organisation or between two or more International Organisations, the *ILC Yearbook* (1982), vol. 2(2), at p. 60, para. 5.

⁵ Jennings, R., “General Course on Principles of International Law,” 121 *Académie De Droit International*, (1967-II), at p.428. See also Taha, F., *International Law and Boundary Dispute*, Abu-Dhabi Press, UAE (1982), at p.117; Tyranowski, J., “Boundaries and Boundaries Treaties in the Law of State Succession,” *National and International Boundaries*, vol. 14, Session 1983, Thessaloniki (1985), at p.537.

⁶ This conflict broke out into armed conflict between the two countries in 1982. See Report of Foreign Affairs Committee of the House of Commons, Session 1983-4. Reprinted in Harris, D., *Cases and Materials on International Law*, 4th ed, Sweet & Maxwell, London (1991), at pp.196-8, see also pp.855-67.

⁷ The Award of this dispute was reprinted in 54 *ILR*.

into between interested neighbours, such as frontier conventions, or by acts of recognition of States within fixed boundaries.”⁸ A territorial dispute is *ipso facto* a boundary dispute, because it is meaningless to claim a territorial area without a defined boundary line. On the other hand, a claim of a boundary line is *ipso facto* a claim to “the territory enclosed within it.”⁹ So, if neighbouring states have agreed on a boundary line, the territorial dispute will be solved by looking to that line.¹⁰

Whereas it is true that each term involves the other, it does not follow that there are no differences between them. Indeed differences can be identified, especially with regard to maritime zones. In this context, neighbouring states whether adjacent or opposite have in international law “a right to a maritime zone which exists independently of, and prior to any delimitation.”¹¹ A disagreement may arise in determining the boundary of such a zone. The *North Sea Cases*, may be cited as an example of a boundary dispute, where the parties were in agreement about the other’s entitlement to a continental shelf in the North Sea, but where they disagreed about the actual location of the boundary for each continental shelf.

To sum up, a territorial dispute involves one state seeking to eliminate another state’s (or states’) claims in regard to a certain area. However, in the case of a boundary dispute, there is no complete elimination; rather there is recognition by the parties that both have rights in the disputed area, the main task being how to determine the exact limits of those rights.¹²

⁸ *Island of Palmas Case*, *The Hague Court Reports*, Second Series, Scott (ed.), Oxford University Press, New York (1932), at p.92.

⁹ Jennings, *op. cit.*, n.5, at p.428. See also Jennings, R.Y., *The Acquisition of Territory in International Law*, Manchester University Press, Manchester (1963), at p.13; *Oppenheim’s International Law*, 9th ed., vol. 1, Peace, Jennings and Watts (eds.), Longman, London (1996), at pp.668-9; *North Sea Case*, at para.20.

¹⁰ In the *Temple Of Préah Vihear Case* of 1962 the International Court of Justice held that it could “only give a decision as to the sovereignty over the Temple area after having examined what the frontier line” was. See *ICJ Reports 1962*, at pp.16-7.

¹¹ Mr. Mohammed Bedjaoui’s dissenting opinion in the *Guinea-Bissau/Senegal Arbitration*, 83 *ILR*, at pp.49-50.

¹² Sharam, S.P., “Boundary Dispute and Territorial Dispute A Comparison,” 10 *IJIL* (1970), at p.159.

Maritime boundary delimitation and land boundary determination

Unlike the distinctions between a territorial dispute and a boundary dispute, the differences between a maritime boundary delimitation and a land boundary determination are clearly distinguishable. The World Court in the *Burkina Faso v. Mali Frontier Dispute*, 1986, held that:

the process by which a court determines the line of a land boundary between two States can be clearly distinguished from the process by which it identifies the principles and rules applicable to the delimitation of the continental shelf.¹³

The main differences between a maritime boundary delimitation and a land boundary determination,¹⁴ are, it is suggested, the following ones:

(1) The basis of title¹⁵

In a land boundary a claim of title is based on the traditional rules regarding modes of acquisition of title (e.g. Accretion, Occupation, Cession, Acquisitive Prescription, Conquest).¹⁶ By way of contrast, in a maritime boundary, the rights of a coastal state over maritime zones “exist *ipso facto* and *ab initio* by virtue of its sovereignty over the land”¹⁷ with regard to territorial sea and continental shelf, or by positive claim with regard to the contiguous zone and the EEZ.¹⁸ So the traditional rules of acquisition, except prescription,¹⁹ have no relevance in this question.²⁰

¹³ *Burkina Faso v. Mali Frontier Dispute*, at para. 47.

¹⁴ For further discussion, see Weil, P., “Geographic Considerations in Maritime Delimitation, *International Maritime Boundaries*,” Charney and Alexander (eds.), Martinus Nijhoff Publishers, the Netherlands (1993), at p.121.

¹⁵ See in general Fitzmaurice, G., *The Law and Procedure of the International Court of Justice* 1947-59, Cambridge University Press, Cambridge (1995), at pp.177-83; *Oppenheim’s, op. cit.*, n.9, at pp.679-708.

¹⁶ See Brownlie, I., *Principles of Public International Law*, 4th ed, Clarendon Press, Oxford (1990), at p.131; *Oppenheim’s, op. cit.*, n.9, at p.679. See also Post, H., “Adjudication as a Mode of Acquisition of Territory?” *Fifty Years of the International Court of Justice*, Essays in Honour of Sir R. Jennings, Lowe and Fitzmaurice (eds.), Cambridge University Press, Cambridge (1996), at p.237.

¹⁷ *North Sea Cases*, at para.43.

¹⁸ See Chapter One.

¹⁹ See Section Two of this chapter for more discussion on the concept of historic title.

²⁰ Jennings, R.Y., “The Principles Governing Marine Boundaries,” *Staat und Völkerrechtsordnung, Festschrift für Karl Doehring* (1989), at pp.397-8.

(2) *The role of the court or arbitrator*

Where a land boundary determination is concerned, the role of the international adjudicative body is to consider all the factors which could help to determine which claimant has a better root of title.²¹ However, where a maritime boundary delimitation is concerned the main task of a court or arbitral tribunal is to determine what principles and rules of international law are to be applied in the delimitation of the boundaries between two or more states.

(3) *A third state's interest*

In a maritime boundary delimitation a third state's interest has been taken into consideration in some cases when the process of drawing a boundary line takes place.²² In contrast, in a land boundary determination a third state's interests are of no relevance to the process of determination, except where the court or tribunal purports "to fix a tri-point with binding effect on third state."²³

The similarity between the two concepts

Although there are clear differences between land boundary determination and maritime boundary delimitation, there are, on the other hand, some common characteristics.²⁴ Perhaps the most important is the stability and permanence of boundaries. This degree of stability is well illustrated in the provisions of

²¹ For example, in the *Rann Of Kutch case (India and Pakistan)* of 1965, the arbitrator stated that: "the territorial dispute which the Tribunal is called upon to decide is one in which opposing claims have been made with reliance upon conflicting testimony, and where a judgement has to be given on the relative strength of the cases made out by the Parties." See 7 *ILM* (1968), at p.679.

²² For instance, the ICJ in the *Libya v. Malta Case* held that: "It cannot wholly put aside the question of the legal interest of Italy as well as of other States of the Mediterranean region, and they will have to be taken into account." See *Libya v. Malta Case*, at para.42. For further discussion on the relevant of third party interest on the delimitation process, see Chapter Three/Section Two.

²³ Monroe, L., "International Land Boundary Delimitation—Principle of *Uti Possidetis*—Distinction Between Determination of a Land Boundary and Delimitation of Continental Shelf," 81 *AJIL* (1987), at p.413; *Burkina Faso v. Mali Case*, at paras.47-50; Naldi, G.J., "Case concerning the Frontier Dispute (Burkina Faso/Republic of Mali): *Uti Possidetis* in an African Perspective", 36 *ICLQ* (1987), at p.896.

²⁴ For example: (1) The delimitation of both is a legal-political operation, even if the boundary line has been described as a natural boundary; (2) "equity enters into both types of delimitation." See Weil, P., *The Law of Maritime Delimitation-Reflections*, Grotius Publications Limited, Cambridge (1989), at p. 92. And see the *Gulf of Maine Case*, at para. 56.

international law which prevent a treaty establishing a boundary from being destabilized in the case of a fundamental change of circumstances, or in a case of state succession.²⁵ Moreover, the stability of a treaty establishing a boundary is supported in international law by invoking the principle of *uti possidetis*. For clarification these three cases will be discussed in some detail.

(1) Fundamental change of circumstances

The general rule is that a treaty in a fundamental change of circumstances could become destabilized. However, it is a different matter if the treaty establishes a boundary. Article 62(2) of 1969 the Vienna Convention reads:

A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty: (a) if the treaty establishes a boundary...

The term “boundary” in the above-quoted Article raises the question of whether or not it extends to maritime boundaries. The World Court in the *Aegean Sea Case* answered the question in the affirmative.²⁶ However, the ILC in its thirty-fourth session of 1980 failed to provide full support for the opinion of the Court in the *Aegean Sea Case*, nor was it able to give a concrete answer. The members of the Commission were in favour of dealing with the problem in the commentary of the Report.²⁷ The Commentary of the report of the ILC in this respect stated that: “Lines of maritime Delimitation...may in fact have special features and it is possible that the stabilising effect of article 62 does not extend to certain lines of maritime delimitation, even if, to all intents and purposes, they constitute true boundaries. In any event, the commission is not equipped to

²⁵ However, this is not to suggest that the stability of a treaty establishing a boundary could never be challenged. This could occur, for example where the treaty is void *ab initio*, or where there is a material breach by one party, or where there is subsequent conduct by the parties that *per se* contradicts the provisions of the treaty. For more discussion, see Marston, G., “The Stability of Land and Sea Boundary Delimitation in International Law,” *Maritime Boundaries*, World Boundaries, vol. 5, Blake (ed.), London (1994), at p.148; Brownlie, *op. cit.*, n.16, at pp. 613-6 and pp.625-6; Taha, *op. cit.*, n.5, at pp.100-1; Shaw, M., *International Law*, 3rd ed, Grotius Publications Limited (1991), at pp.589-98.

²⁶ *Aegean Sea Case*, at para. 85.

²⁷ See Question of Treaties Concluded between States and International Organisations or between two or more International Organisations, *ILC Yearbook* (1980), vol. 1, at pp. 8-15.

interpret either the Vienna Convention or the Convention on the Law of the Sea.”²⁸

(2) *State succession*²⁹

In general a newly independent state³⁰ could use the “clean slate” rule to free itself from any treaty in force at the date of formulation of this new independent state.³¹ However, this is not the case if the treaty in question is one establishing a boundary.³² Article 11 of the Vienna Convention on Succession of States in respect of Treaties, 1978, reads:

A succession of States does not as such affect (a) a boundary established by a treaty; or (b) obligation and rights established by a treaty and relating to the regime of a boundary.

A similar question to that of the case of a fundamental change of circumstances may be raised over whether the term “boundary”, in the above quoted Article, is confined to a land boundary or whether it also extends to a maritime boundary. Marston correctly remarked that:

If the doctrine of executed treaty provisions applies to lines of maritime delimitation, and there seems to be no good reason why it should not, then the successor state or states are obliged, in the absence of agreement to do otherwise, to respect the line, since it defines the area of spatial competence appurtenant to the land territories to which they have respectively succeeded.³³

²⁸ See *ILC Yearbook* (1980), vol. 1, at pp. 8-15. And the *ILC Yearbook* (1982), vol. 2(2), at p.61, para. 6.

²⁹ For general discussion on succession of state, see *Oppenheim's, op. cit.*, n.9, at pp.208-44; Shaw, *op. cit.*, n.25, at pp.604-28, Brownlie, *op. cit.*, n.16, at pp.654-75; O'Connell, D.P., *State Succession in Municipal Law and International Law*, two volumes, Cambridge University Press, Cambridge (1967). For special reference to state succession to boundaries, see Taha, F., *The International Legal Aspects of the Boundaries of the Sudan with Ethiopia and Kenya*, PhD. Dissertation, vol. 1, Jesus College, Cambridge University (1973), at pp.1-16.

³⁰ For a definition of the term ‘newly independent state’, see Article 2(1)(f) of the Vienna Convention on Succession of States in respect of Treaties, 1978.

³¹ Article 16 of the Vienna Convention on Succession of States in respect of Treaties, 1978.

³² For a comprehensive discussion, see Tyranowski, *op. cit.*, n.5, at pp.459-540.

³³ Marston, *op. cit.*, n.25 at p. 158; see also p.159.

(3) *The uti possidetis principle*^{34 35}

The idea behind this principle, in the words of the World Court is “to prevent the independence and stability of new States being endangered by fratricidal struggles provoked by the challenging of frontiers following the withdrawal of the administering power.”³⁶

The principle of *uti possidetis* appeared for the first time in 1810 in South America,³⁷ in order to secure respect for the territorial boundaries as they existed at the moment when independence was achieved by South American States following the Spanish withdrawal from the area.³⁸ However, in Africa the principle “has a broader meaning because it concerns both the boundaries of countries born of the same colonial empire³⁹ and boundaries which during the colonial era had already an international character⁴⁰ because they separated colonies belonging to different colonial empires.”⁴¹

There can be no doubt about the stability of a land boundary in the light of the principle of *uti possidetis*, because the principle was introduced for this very reason. However, doubt may arise in the case of a maritime boundary. The Tribunal in the *Guinea-Bissau/Senegal Award* debated this question, and decided that the *uti possidetis* principle does apply to a maritime boundary.⁴²

³⁴ For a brief history of the *uti possidetis* principle, see Ratner, S.P., “Drawing a Better Line: *Uti possidetis* and the Borders of New States,” 90 *AJIL* (1996), at pp.592-601; Taha, *op. cit.*, n.29, at pp. 19-22.

³⁵ For discussion on the conflict between the principle of *uti possidetis* and the principle of self-determination, see *Burkina Faso v. Mali Case*, at paras.25-6; Frank, T.M., *Fairness in International Law and Institutions*, Clarendon Press, Oxford (1995), at pp.146-54; Crawford, J., “The General Assembly, the International Court and self-determination,” *Fifty Years of the International Court of Justice*, Essays in Honour of Sir R. Jennings, Lowe and Fitzmaurice (eds.), Cambridge University Press (1996), at pp.601-3; Ratner, *op. cit.*, n.34, at pp.609-13.

³⁶ *Burkina Faso v. Mali Case*, at para. 20. See also Oppenheim's, *op. cit.*, n.9, at pp.669-70. For a discussion on practical impediments to *uti possidetis* principle, see Ratner, *op. cit.*, n.34, at pp.607-8.

³⁷ Naldi, *op. cit.*, n.23 at p.897; Taha, *op. cit.*, n.5, at p.60; Shaw, *op. cit.*, n.25, at pp.302-3.

³⁸ *Burkina Faso v. Mali Case*, at para. 23.

³⁹ I.e. boundaries which resulted from administrative decisions by the colonial power.

⁴⁰ I.e. boundaries resulting from an international agreement between two colonial powers concerning their respective colonial territories.

⁴¹ *Guinea-Bissau/Senegal Award*, at para.61.

⁴² *Ibid.*, at paras. 63-66 and 88. See also dissenting opinion of Mr. Bedjaoui in 83 *ILR*, at pp.60-2. To the same effect, see the *Gulf of Fonseca Case*, at para. 388. See also Chaney, J. I., “Progress in International Maritime Boundary Delimitation Law,” 88 *AJIL* (1994), at p.234.

However, it does not follow that the possibility of a re-examination of boundaries is excluded *in toto*. The commentary of Article 11 of the Vienna Convention on Succession of States in respect of Treaties, 1978, said:

This does not, of course, mean that boundary disputes have not arisen or may not arise between African States. But the legal ground invoked must be other than the mere effect of the occurrence of a succession of States on a boundary treaty.⁴³

A similar view was expressed by the Court of Arbitration in the *Dubai/Sharjah Award*.⁴⁴

In conclusion, it seems fair to suggest that, since the aim of seeking stability and permanence is to maintain the *status quo* and prevent a fundamental change of circumstances from being a source of dangerous friction, it makes no difference whether the case is one of a land boundary or a maritime boundary.⁴⁵ The stability of a boundary must imply: (1) not terminating a boundary treaty on the ground of a fundamental change of circumstances or on the basis of the “clean slate” rule; (2) using the principle of *uti possidetis* to assert the stability of a boundary established by colonial powers.

Delimitation of maritime boundaries and drawing of maritime limits

The drawing of maritime limits is determining the outer limits of maritime zones i.e. internal waters, the territorial sea, the contiguous zone, the EEZ, and the continental shelf of a single coastal state, where these “zones are not in physical contact with those of another coastal state”,⁴⁶ whether opposite or adjacent. This determination is a unilateral act in the sense that only one state is involved. The validity of this limit “with regard to other states depends upon international law.”⁴⁷ It should be mentioned here that for the parties to the 1982

⁴³ *ILC Yearbook* (1974), vol. 2, part 1, at p.199.

⁴⁴ The Court held that “the existence of [the principle of *uti possidetis*] has not prevented certain African States [or any newly independent States] from claiming, after achieving independence, territory under various pretexts, such as that the established boundaries did not correspond with legal reality.” See *Dubai/Sharjah Award*, 91 *ILR*, at p.578.

⁴⁵ A similar view was held by Professor Boyle. See Boyle, A.E., “Maritime Boundaries and UNCLOS: Some Current Problems,” (unpublished paper) Greenwich forum, 30 May 1996, at p.6. See also the *Greenland v. Jan Mayen Case*, at para. 80; Marston, *op. cit.*, n.25 at p.159.

⁴⁶ Caflisch, L., “Maritime Boundaries Delimitation,” 11 *EPIL* (1989), at p.212.

⁴⁷ The *Fisheries Case*, at p.132. See also Fitzmaurice, *op. cit.*, n.15, at pp.213-4.

Convention there should be no unilateral act to determine the outer limit of the continental shelf beyond 200 nautical miles. This outer limit should, according to Article 76(8), be established by the coastal state on the basis of the recommendations of the commission on the limits of the continental shelf provided for in Annex II of the Convention. Indeed, the Court of Arbitration in the *France/Canada Award* rejected the French Government's requests to determine the boundary between the two parties in the area beyond 200 nautical miles. The Court based its rejection on the ground that such delimitation "would constitute a pronouncement involving a delimitation, not 'between the Parties', but between each one of them and the international community, represented by organs entrusted with the administration and protection of the international seabed area...that has been declared to be the common heritage of mankind. [The] Court is not competent to carry out a delimitation which affects the rights of a Party which is not before it."⁴⁸ By way of contrast, the delimitation of a maritime boundary is an operation for establishing lines separating the maritime zones of one state from those of another. This operation is bilateral or multilateral in character.

⁴⁸ The Award, at paras.78-9. See the criticism of Professor Boyle on the Court dictum, "Dispute Settlement and the Law of the Sea Convention: Problem of Fragmentation and Jurisdiction," 46 *ICLQ* (1997), at pp.46-7.

Section Two

Delimitation of the Territorial Sea

Although the origin of the concept of territorial sea as noted above⁴⁹ goes back to the seventeenth century, the history of the delimitation of its boundary starts much later.⁵⁰ The rules and principles which were used in the late nineteenth and early twentieth centuries for this purpose had their origins in the law of boundary delimitation in rivers and lakes.⁵¹ This section will commence by providing a general idea of early state practice and the first attempts at codifying this practice. It will then turn to the work of the ILC and the Geneva Convention on the Territorial Sea and Contiguous Zone that resulted from this work.⁵² The final stage of this section will be devoted to an investigation of the status of the delimitation rules as enunciated in the Geneva Convention in customary law.

Early practice up to 1930

The classical tendency in discussing the matter of territorial sea delimitation is to distinguish between the case of opposite and adjacent coasts. In the case of opposite coasts there were two methods in state practice used for the delimitation: (1) the median line “based on the fundamental principle of sovereign equality”,⁵³ and, (2) the rule of *thalweg*⁵⁴ where a channel of navigation secures equal rights

⁴⁹ See Chapter One.

⁵⁰ For the reason for this delay, see Weil, *op. cit.*, n.24, at pp.135-6.

⁵¹ Johnston, D.M., *The Theory and History of Ocean Boundary-Making*, McGill-Queen's University Press, Kingston and Montreal (1988), at p. 124.

⁵² As will be seen below, the territorial sea delimitation formula under the Geneva Convention on the Territorial Sea and Contiguous Zone has been reproduced in the 1982 Law of the Sea Convention. Therefore, there will be no separate analysis of the territorial sea delimitation under the 1982 Convention.

⁵³ An example of the use of the median line is the UK-US protocol of March 1873 on the delimitation of the water boundary between the two states. The protocol “applied the median line principle flexibly by ignoring rocks and taking navigational routes into consideration.” See Rhee, S.M., “Sea Boundary Delimitation between States before World War II,” 76 *AJIL* (1982), at p. 561; see also p. 556.

⁵⁴ The term ‘*thalweg*’ means “the deepest channel in the riverbed, [and] the most easily navigable part of the rivers.” The term ‘*thalweg*’ has its origins in river law but it is sometimes employed in the law of the sea. For more details, see Johnston, *op. cit.*, n.51, at p. 125.

of navigation for both states.⁵⁵ In addition, a common zone between the parties involved was sometime suggested to “preserve equal access and the right of navigation in straits and other channels where the 3-mile zones overlapped.”⁵⁶ In 1895 the International Law Association accepted a proposal that the median line should be regarded as the general rule for the delimitation of the territorial sea between opposite states in narrow straits or bays.⁵⁷ By way of contrast, in the case of adjacent coasts, the situation in the nineteenth century suffered from the vagueness of state practice.⁵⁸ Indeed, the Supreme Court of the United States in the *Louisiana v. Mississippi* case in 1906 remarked that:

Whenever it is necessary for two contiguous States to run a water boundary through an archipelago of islands off their coasts it is only possible to do so by convention, as international law provides no rule upon the subject.⁵⁹

In 1908 Deszö Dárdai, at the twenty-fifth Conference of the International Law Association in Budapest, suggested that the median line principle could fill the gap in international law regarding the delimitation of the territorial sea between adjacent states.⁶⁰

The Grisbadarna Case

The Permanent Court of Arbitration at the Hague in 1909 presided over a dispute between Norway and Sweden concerning maritime boundary delimitation; the *Grisbadarna Case*. The parties to the arbitration agreements asked the court to decide whether the boundary line was to be considered, either

⁵⁵ The US Supreme Court in the *Louisiana v. Mississippi Case* of 1906 stated in relation to this that: “Where there is no necessary track of navigation, the line of demarcation is drawn in the middle...but wherever there is a deep water sailing channel therein...the rule of the thalweg applies.” Quoted from *Rhee, op. cit.*, n.53, at pp.561-2.

⁵⁶ *Ibid.*, at p.565. The French-Spanish agreement in March 1879 to establish a common zone in the Bay of Figuer may be cited as an example of using a common zone method as a way of solving a dispute in cases “where mere division would not provide convenience and efficiency in the use of sea, and where interest in the sea could be exploited more equitably and effectively than by dividing them in terms of maritime space.” See *Ibid.*, at p.585; see also p.562.

⁵⁷ *Ibid.*, at p.563. For general survey of state practice and the opinion of scholars, see *Ibid.*, at p.564.

⁵⁸ The Mexico-US treaty of February 2, 1848, for example, stated that: “the boundary line between the two Republics shall commence in the Gulf of Mexico, three leagues from land, opposite the mouth of the Rio Grande.” Quoted from *Ibid.*, at p.564.

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*

wholly or in part, as being determined by the boundary treaty of 1661; if not, the Tribunal “shall have power to determine the [boundary line] taking into account the circumstances of fact and the principles of international law.”⁶¹

The Tribunal in its award held that:

in accord with the ideas of the seventeenth century and with the notions of laws prevailing at that time...the delimitation should be made today by tracing a line perpendicularly to the general direction of the coast.⁶²

However, at the final sector of the boundary line, the perpendicular line had been tilted to the south, i.e. to the Norwegian side, to give Sweden a larger share of the lobster fishing in the shoal of Grisbadarna bank. This adjustment was designed to prevent the inequitable result which would result from using the perpendicular line in the Grisbadarna fishery bank. This inequitable result would allocate to Norway the larger share of the Grisbadarna fishery bank,⁶³ despite the fact that the Swedes had used this bank “much earlier and much more effectively than the Norwegians.”⁶⁴ This adjustment to the perpendicular line had been justified on the basis of historical usage.⁶⁵

It is evident from the above that three methods were used in territorial sea delimitation in this period. The thalweg and the median line rules in the case of the delimitation between opposite coasts, and the perpendicular line and the median line for the delimitation between adjacent coasts. State practice reveals a tendency to use one method or the other for the delimitation of their territorial sea boundary. It is interesting to note that the *Grisbadarna* decision to use the perpendicular line method, “was not so much a victory of [this] method over the median line.”⁶⁶ Rather was it a reflection of the methods and the rules prevailing in the seventeenth century.⁶⁷ The median line, the Tribunal concluded, did not

⁶¹ See Article 3 of the Norway and Sweden Agreements of Arbitration of March 14, 1908. *The Hague Court Report*, Scott (ed.), Oxford University Press (1916), at p.134.

⁶² *Ibid.*, at p. 129.

⁶³ This was in addition to their control over the whole of Skjötte Grunden fishery banks.

⁶⁴ The Norwegians had other maritime interest, such as navigation, and they were not entirely dependent, like the Swedes, upon fishing the Grisbadarna fishery bank.

⁶⁵ *Ibid.*, at p. 131. See below for more discussion on the concept of historic title. For the relevant of the natural resources on the delimitation process, see Chapter Three/Section Two.

⁶⁶ Johnston, *op. cit.*, n.51, at pp. 128-9.

⁶⁷ *Grisbadarna Case*, at p. 129.

“find sufficient support in the law of nations in force in the seventeenth century.”⁶⁸ By way of contrast, the perpendicular line method, the Tribunal found, was the prevailing method at that period.⁶⁹ Hence the Tribunal adopted this method, and “spared itself the pain of choosing between the competing rules or principles of international law that had evolved since 1661.”⁷⁰

Considerations of equity

Although there has been diversity and inconsistency in state practice over using one method or another, it is possible to trace some considerations of equity in these practices. These considerations, in reality, could justify the variety of methods used in practice. The median line method, for example, was proposed in order to reach an equitable delimitation between the parties. This was done by extending the sovereignty of each party to the middle. However, in some instances, such a method would not produce the equitable result in the delimitation. An example of such an instance is when there are historical rights or if there is a navigation channel in the area.⁷¹ Using a strict median line in such cases may deprive one party of its historical rights over an area, or place the entire navigation channel within one party’s jurisdiction. Considerations of equity may require adjustment in the median line, or any other line that was chosen initially to abate the inequitable result. The *Grisbadarna Award* to adjust the perpendicular line in the Grisbadarna fishery bank may be cited as an example. In this Award the adjustment was intended to preserve Swedish historical interests in this bank from falling into Norwegian hands.⁷²

⁶⁸ Ibid.

⁶⁹ Ibid.

⁷⁰ Johnston, *op. cit.*, n.51, at p. 128.

⁷¹ The presence of islands was not a significant problem due to the narrow limit of the territorial sea at that time. See Rhee, *op. cit.*, n.53, at p. 586.

⁷² For more discussion on equitable considerations in territorial sea delimitation, see Ibid., at pp.585-7.

Attempts to codify state practice

The Hague Codification Conference of 1930 was the first international attempt to codify state practice under the League of Nations.⁷³ In 1925 the preparatory work for the Conference began. The League of Nations Committee of Experts for the Progressive Development of International Law set up a subcommittee of three to submit draft articles on the question of territorial sea delimitation. A distinction was drawn between three different cases: (1) delimitation between opposite coasts; (2) delimitation between opposite coasts in a narrow strait; and, (3) a delimitation between adjacent coasts.

In the first case the matter had not come up for discussion, due to the fact that the acceptable breadth of the territorial sea at that period, generally speaking, was only three nautical miles. This narrow limit did not cause a major problem in delimitation in contrast to the situation which resulted from the subsequent general move to a 12 nautical miles limit. Therefore, the matter was not subject to debate at that time. In the second case the subcommittee managed to agree and formulated a draft article for the delimitation between opposite coasts in a narrow strait by using ‘in principle’ the median line.⁷⁴ Later on, the agreed draft articles become one of the most controversial matters. The Swedish and Danish delegates, for example, expressed doubt about the draft article forming a suitable part of a general rule. The US representative argued for the deleting of the words ‘in principle’. This was in order to adopt the median line as a general rule. As a result of this controversy the decision was taken to remove the issue *in toto* from the final draft of the Hague Conference.⁷⁵

In the final case, i.e. that of adjacent states, there were deeply divergent views between the members of the subcommittee of experts.⁷⁶ Hence, no draft articles in this sphere were formulated.

⁷³ For general survey of the proposal of other private associations in this matter, see Rhee, *op. cit.*, n.53, at pp.574-5.

⁷⁴ *Ibid.*, pp.575-6. Using ‘in principle’ the median line for the delimitation was also adopted in Article 9 of Draft Convention on Territorial Waters, See 23 *AJIL* (1929), Special Supplement, at p. 281. For more details on Harvard Draft Convention, see Chapter One at p.9, note 52.

⁷⁵ Rhee, *op. cit.*, n.53, at pp. 576-7.

⁷⁶ *Ibid.*, at p.576.

In the period following the Hague Conference there was support for and frequent use of the median line system in delimitation.⁷⁷ On the other hand, “some of the alternatives to the median line began to drop out of contention.”⁷⁸ Not unexpectedly, this support and use was not free from controversy, although the argument this time was more to do with the technical question of how best to draw the median line.⁷⁹ It was not until 1937 that this question was settled, when Boggs, the American Geographer, came up with a new technique to draw the median line; namely, a line “every point of which is equidistant from the nearest point or points on opposite shores—of the river, lake, gulf or strait.”⁸⁰

To sum up, state practice during this period was such that it would be fair to say that it failed to establish any acceptable general rule on this issue.⁸¹ Indeed, the ILC remarked that “international practice is not uniform as far as the delimitation of the territorial sea is concerned.”⁸²

The work of the International Law Commission

The question of territorial sea delimitation in the ILC was raised for the first time in 1953. A distinction was made between the criteria for delimitation between adjacent states and that for opposite states. In the case of adjacent states, the principle of equidistance was suggested as a basis for delimitation of the territorial sea where the states concerned did not otherwise reach an agreement. In

⁷⁷ This was because, in the words of Rhee, the “development of technical means of delimitation infused states with the desire to determine ‘every inch’ of their territorial sea. The median line principle appealed to this desire for precise delimitation, for no other principle had such certitude in application.” See *Ibid.*, at p.579.

⁷⁸ Johnston, *op. cit.*, n.51, at p.131. Also see Rhee, *op. cit.*, n.53, at p. 580. The support and use of the median line more than any other alternative methods in early practice was in fact a reflection of the fundamental notion that “the sovereignty of each [party] shall be conceived of as extending to the middle.” This was in order to divide and share the area of delimitation equally and fairly between the parties. See Rhee, *op. cit.*, n.53, at p. 585.

⁷⁹ Johnston, *op. cit.*, n.51, at p. 130.

⁸⁰ Boggs, S.W., “Delimitation of Seaward Areas under National Jurisdiction,” 45 *AJIL* (1951), at pp.256-8. For general survey on the different methods used to construct a median line, see Rhee, *op. cit.*, n.53, at pp.580-5.

⁸¹ *Ibid.*

⁸² ILC Report to the General-Assembly, ILC *Yearbook* (1956), vol. 2, at p.256. See also Rhee, *op. cit.*, n.53, at p.555.

the final report of the ILC in 1956 the principle of equidistance was formally adopted for adjacent states under draft Article 14.⁸³

In the case of opposite states a distinction was drawn between the case where the delimitation was the area of a strait, and instances where the delimitation involved a non-strait area. In the case of the former it was suggested that “the limits of the territorial sea shall be ascertained in the same manner as on the other parts of the coasts, [but] if the breadth of the straits...is less than the extent of the belt of territorial sea adjacent to the two coasts, the maritime frontier of the States which are opposite each other shall be determined in conformity” to the median line.⁸⁴ In the case of the latter, i.e. delimitation in a non-strait area, the median line was suggested as the basis for delimitation, where states did not otherwise reach an agreement between themselves. Thereafter the rules in the two cases were merged, following a successful proposal from the Norwegian Government, into one article, Article 12, of the ILC final report of 1956.⁸⁵

Delimitation of the Territorial Sea in the 1958 Convention

The two articles concerning territorial sea delimitation (Articles 12 and 14) contained in the final report of the ILC in 1956 were merged, following a proposal by Norway’s Government in the Geneva Conference of 1958, into

⁸³ The commentary of the final report, however, indicated that the delimitation of the territorial sea boundary between adjacent states could be achieved by various means; as follows:

(1) by extending the land frontier out to the sea; (2) by drawing a line at right angles to the coasts at the point where the land frontier reached the sea, (perpendicular line); (3) by using the geographical parallel to draw a line at the point at which the land boundary meets the sea; (4) to draw a line perpendicular to the general direction of the coastline; (5) using the median line which should be drawn according to the principle of equidistance. See *ILC Yearbook* (1956), vol.2, at p.272.

⁸⁴ Article 13 paras. 1 and 2 of the ILC Report. See *ILC Yearbook* (1954), vol. 2, at pp.156-7.

⁸⁵ The Commentary of the ILC final report have said that the combination of the two articles was preferable “since the delimitation of the territorial sea in straits did not present any different problem from that of the opposite coasts of two States generally.” See *ILC Yearbook* (1956), vol. 2, at p.271; For the Norwegian proposal, see *UNCLOS I Official Records*, vol. 3, at p. 193 and p. 239. Moreover, mention must be made here regarding the case of opposite states if the result of the delimitation was enclaves of sea not more than two miles across. In such a case the enclaves may be, by agreement between the opposite states, assimilated into their territorial sea area, but if the width of an area of the sea between two belts of the territorial sea is more than two miles, the area should be treated as high seas. See *ILC Yearbook* (1956), vol. 2, at pp. 257-8.

Article 12 of the 1958 Geneva Convention on the Territorial Sea and Contiguous Zone.⁸⁶

The delimitation of the territorial sea between states with opposite or adjacent coasts can, pursuant to Article 12, be achieved by agreement, whether express or *de facto*, or by applying the median line system; that is, using a line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two states is measured. It is noteworthy that the median line system will be applied, in the case of opposite states, where the distance between the opposing coasts is less than twice the breadths of two territorial seas. Further, concerning the possibility of a case where there are territorial seas of different breadths opposite each other, Article 12 imposes upon states the obligation not to extend their territorial seas beyond the median line.

However, the application of the median line method could be excluded where another line is justified by reason of historic title or special circumstances.⁸⁷ Article 12, it should be noted, has been adopted unchanged into Article 15 of the 1982 Convention.⁸⁸

It is worth mentioning here that the Geneva Convention of 1958 regarding the delimitation of the contiguous zone justified the departure from the median line

⁸⁶ The principle of equidistance, in the case of adjacent states, has been deleted from the final text of the Convention. Similarly, in the case of opposite states, the matter of elimination of pockets of high seas' enclaves between two belts of the territorial sea, has been omitted from the text of Article 12 of the Geneva Convention. This omission could be accounted for by the following reasons: (a) Among the states who took part in the Geneva Conference of 1958 there was no unanimity on the question of elimination of pockets in the high seas. Indeed when the matter was put to the vote, it was rejected by 30 votes to 25 with 13 abstentions. (b) The adoption of a straight baseline technique has, in practice, solved the problem of the enclaves of the high seas. Moreover, the idea of the elimination of pockets in the high seas becomes meaningless after the concept of the exclusive economic zone has been introduced, in which the coastal states may extend their jurisdiction up to 200 nautical miles from the baselines from which the breadth of the territorial sea is measured. However, a coastal state's rights in the EEZ, as we saw, are not like its rights in the territorial sea. See Chapter One.

⁸⁷ Article 12(1) reads: "Where the coasts of two States are opposite or adjacent to each other, neither of the two States is entitled, failing agreement between them to the contrary, to extend its territorial sea beyond the median line...The provisions of this paragraph shall not apply, however, where it is necessary by reason of historic title or other special circumstances to delimit the territorial seas of the two States in a way which is at variance with this provision."

⁸⁸ Whenever Article 12 is mentioned in this work, Article 15 of the 1982 Convention is also meant.

only where there was an agreement between the parties.⁸⁹ Therefore the concepts of ‘special circumstances’ and ‘historic title’ have no role to play in the delimitation of the contiguous zone. This may be because coastal states possess in the contiguous zones only strictly limited power.⁹⁰ Article 24(3) of the 1958 Convention reads:

Where the coasts of two states are opposite or adjacent to each other, neither of the two states is entitled, failing agreement between them to the contrary, to extend its contiguous zone beyond the median line....

Interestingly, in the 1982 Convention the matter of the delimitation of the contiguous zone was omitted.⁹¹ This is “because the contiguous zone forms part of the exclusive economic zone; hence the delimitation of the latter will automatically bring about that of the former.”⁹²

Exceptions to the median line rule

In the report of the ILC in 1956 the term ‘special circumstances’, as mentioned above, was adopted to justify a departure from the median line system without any elaboration. Indeed, the commission itself considered that “it would be wrong to go into too much detail and that the rule should be fairly flexible.”⁹³ Consequently, Article 12 did not “provide a general guideline for determining

⁸⁹ It is worth noting here that the issue of contiguous zone delimitation was not mentioned *in toto* in Article 66 of the ILC final report. On March 20, 1958 at the Geneva Conference, the Yugoslavian delegate submitted a proposal to modify Article 66 from a different aspect, *inter alia*, to insert a new paragraph 2, and to re-number paragraph 2 as paragraph 3, and at the end of this paragraph add the following: “The delimitation of this zone between two states, the coast of which are opposite each other at a distance less than the breadth of their territorial seas and contiguous zones, or between adjacent states, is constituted, in the absence of agreement, by the median line....”

The first committee adopted the Yugoslavian proposal under Article 66(3) in document A/COMF.13/C.1/L.164. On April 24, 1958 a Drafting Committee “was charged with the task of reviewing all articles before the first committee and of making recommendations for the textual co-ordination of proposals expressly referred to it.”

The Drafting Committee in discussing para. 3 of Article 66 had suggested identical language to the first sentence of para. 1 of Article 12 to be adopted for para. 3 of Article 66. The suggestion was accepted and Article 66(3) was formally adopted in the final text of the Convention under article 24(3). For more details, see *UNCLOS I Official Records*, vol. 3, at p.257.

⁹⁰ Caflisch, *op. cit.*, n.46, at p.214.

⁹¹ See Chapter One/Section Two for more discussion.

⁹² “Problems could nevertheless arise for States which do not claim an exclusive economic zone.” See Caflisch, *op. cit.*, n.46, at p.214.

⁹³ The commentary on Article 12. See *ILC Yearbook* (1956), vol. 2, at p. 271, para. 2.

what constitutes special circumstances.”⁹⁴ To avoid any repetition, and following the classical tendency in the literature, the issue of special circumstances will be discussed in detail in the next chapter entitled “Delimitation of the Continental Shelf.”⁹⁵

The second specific issue addressed in Article 12 is the historic title. The idea behind the specific recognition of the doctrine of historic title in this context was that of maintaining the *status quo* over an area when the Geneva Convention entered into force; by claiming historic title a state does not lose the rights it had prior to the Convention. As has been stated elsewhere, “states could not be expected to accept rules which would deprive them of considerable maritime areas over which they had hitherto had sovereignty.”⁹⁶ Furthermore, the World Court in the *Fisheries Case* held that there could be “historic titles justifying situations which would otherwise be in conflict with international law.”⁹⁷ However, before we discuss the doctrine of historic title as a reason in Article 12 which justifies the departure from the median line system, it is worth mentioning briefly how a historic title can be established over a sea area.

⁹⁴ Chiu, H., “Some Problems Concerning the Application of the Maritime Boundary Delimitation Provisions of the 1982 United Nation Convention on the Law of the Sea between Adjacent or Opposite States”, 9 *Maryland Journal of International Law* (1985), at p. 7. See also *Oppenheim’s, op. cit.*, n.9, at p.614.

⁹⁵ However, in the territorial sea context the possibility of navigation interests has been regarded as special circumstances. Indeed, in the *Beagle Channel Award* of 1977, concerning the maritime boundary between Chile and Argentina, the Court of Arbitration took account of, *inter alia*, “navigability and the desirability of enabling each party so far as possible to navigate in its own waters.” (The *Beagle Channel Arbitration*, at para.110.) This is so in the context of territorial sea delimitation, but in the context of continental shelf delimitation, there is no genuine link, in law, between the continental shelf on the one hand, and navigation interest on the other. This is because all states enjoy the rights of navigation in the continental shelf area. Hence, there is no justification for adjusting a provisional boundary line to give access for either party, since this right is already guaranteed under the rules of international law. See Article 78(2) of the 1982 Convention; *France/Canada Award*, at para. 88; Brown, E.D., *Sea-bed Energy and Minerals: The International Legal Regime*, vol. 1, Continental Shelf, 2nd ed, Martinus Nijhoff Publishers, the Netherlands (1992), at p.81; Evans, M., *Relevant Circumstances and Maritime Delimitation*, Clarendon Press, Oxford (1989), at pp.179-82; see also *Oppenheim’s, op. cit.*, n.9, at p.614.

⁹⁶ The Secretariat of ILC Study in the Juridical Regime of Historic Waters, Including Historic Bays, *ILC. Yearbook* (1962), vol. 2, at p.7, para.38.

⁹⁷ *Fisheries Case*, at p.131.

*Establishing historic title*⁹⁸

It is generally agreed that there are three elements required for the establishment of historic title:

1. The exercise of sovereignty over a certain area by the state claiming the historic title. This exercise must be in proportion to the claim, and be effective in displaying state sovereignty.⁹⁹ For example, supposing that a state claims, on a historical basis, an exclusive right to fish in a certain area. The effective display of state sovereignty, in this instance, would be manifested in preventing foreign fisherman from fishing in that area or, if allowed to fish, imposing upon them certain conditions.¹⁰⁰
2. The acts of the claiming state must be continuous and public over a long period of time with the intention to own.¹⁰¹ Therefore, an *ad hoc* or secret measure cannot establish a historic title.¹⁰²
3. The exercise of sovereignty by the claiming state must be peaceful and unchallenged by other states. In other words, the acts of the claiming state should be combined with inaction on the part of other states.¹⁰³ This is because where protest is necessary, according to state practice, to preserve rights,¹⁰⁴ toleration or acquiescence “is an essential element in the promotion of stability

⁹⁸The burden of proof is on the claiming state to prove that the necessary elements of historic title have been established, see Bouchez, L.J., *The Regime of Bays in International Law*, A.W. Sythoff, Printing Division, Leyden, the Netherlands (1964), at pp.281-2. See also Scobbie, I., “The ICJ and the Gulf of Fonseca,” 18 *Marine Policy* (1994) at p. 259; Clark, W., *Historic Bays and Waters*, Oceana Publications Inc., New York (1994), at pp.147-50.

⁹⁹ Clark, *op. cit.*, n.98, at pp.114-8; The Study, *op. cit.*, n.96, at paras. 85-7.

¹⁰⁰ The Study, *op. cit.*, n.96, at paras. 98-100. It should be mentioned here that the legal status of historic waters depends on the type of sovereignty that is exercised over them. If the claiming state exercises authority over them similar to the authority which she exercises over the internal water, the historic water should be, therefore, regarded as internal water. While, if the claiming state exercises a territorial sea sovereignty over the area which she claims on the basis of historic title, they, i.e. the historic waters, should be regarded as territorial sea.

¹⁰¹ Clark, *op. cit.*, n.98, at pp. 122-32.

¹⁰² *Gulf of Fonseca Case*, at paras.391, 394 and 405. See also The Study, *op. cit.*, n.96, at p.15, paras. 96, 102-105.

¹⁰³ See *Fisheries Case*, at p.139; *Tunisia v. Libya Case*, at para.100; *Gulf of Fonseca Case*, at para.391; and see paras. 394 and 405. See also Clark, *op. cit.*, n.98, at pp.132-43; The Study, *op. cit.*, n.96, at p.16, paras.106-30.

¹⁰⁴ The Court in the *Fisheries Case* stated, in regard to the Norwegian protest, that: “In any event the ten-mile rule would appear to be inapplicable as against Norway inasmuch as she has always opposed any attempt to apply it to the Norwegian Coast.” The *Fisheries Case*, at p.131.

in international relations.”¹⁰⁵ So if there is a general opposition from foreign states to the claim of the claiming state no historic title can be formed.¹⁰⁶

These three elements—“immemorial possession accompanied by *animo domini* both peaceful and continuous and by acquiescence on the part of other nations”—were described by the Chamber in the *Gulf of Fonseca Case*¹⁰⁷ as usually recognized reasons for a body of water being regarded as a historic water.¹⁰⁸

State Practice

In a number of bilateral agreements historic title has been taken into account in the delimitation of a maritime boundary. The India-Sri Lanka agreement on the delimitation of the historic waters between the two countries, may be cited as an example. The agreed boundaries, illustrated below, seem to be a modified median line system taking into account the historic waters. Article 6 of the India-Sri Lanka agreement granted to the citizens of both countries their traditional fishery rights.¹⁰⁹

In the Arabian Gulf the notion of historic title only arises in regard to the pearl fisheries.¹¹⁰ However, hitherto, it has not played any role in the actual delimitation of maritime boundaries.

¹⁰⁵ Muller and Cotter, “Acquiescence” in R. Bernhardt (ed.), *EPIL* (1992) vol.1, at pp. 214-5. For more discussion on acquiescence and protest, see Fitzmaurice, *op. cit.*, n.15, at pp.158-77 and p 230. Brownlie, *op. cit.*, n.16, at pp.165-9; Taha, *op. cit.*, n.5, at pp. 109-13.

¹⁰⁶ Bouchez, *op. cit.*, n.98, at p.269.

¹⁰⁷ In his comments on the decision of the Central America Court of 1917 regarding the character of the Gulf as a historical bay.

¹⁰⁸ *Gulf of Fonseca Case*, at para.391; see also paras. 394 and 405.

¹⁰⁹ Article 6 provides: “The vessels of India and Sri Lanka will enjoy in each other’s waters such rights as they have traditionally enjoyed therein.” For the text of the agreements, see *International Maritime Boundaries*, Charney & Alexanders (eds.), Martinus Nijhoff Publishers, the Netherlands (1993), at pp.1416-7.

¹¹⁰ For discussion on the pearl fisheries’ banks in the Gulf, see Chapter One/ Section Three. See also *Oppenheim’s, op. cit.*, n.9, at pp.784-5.

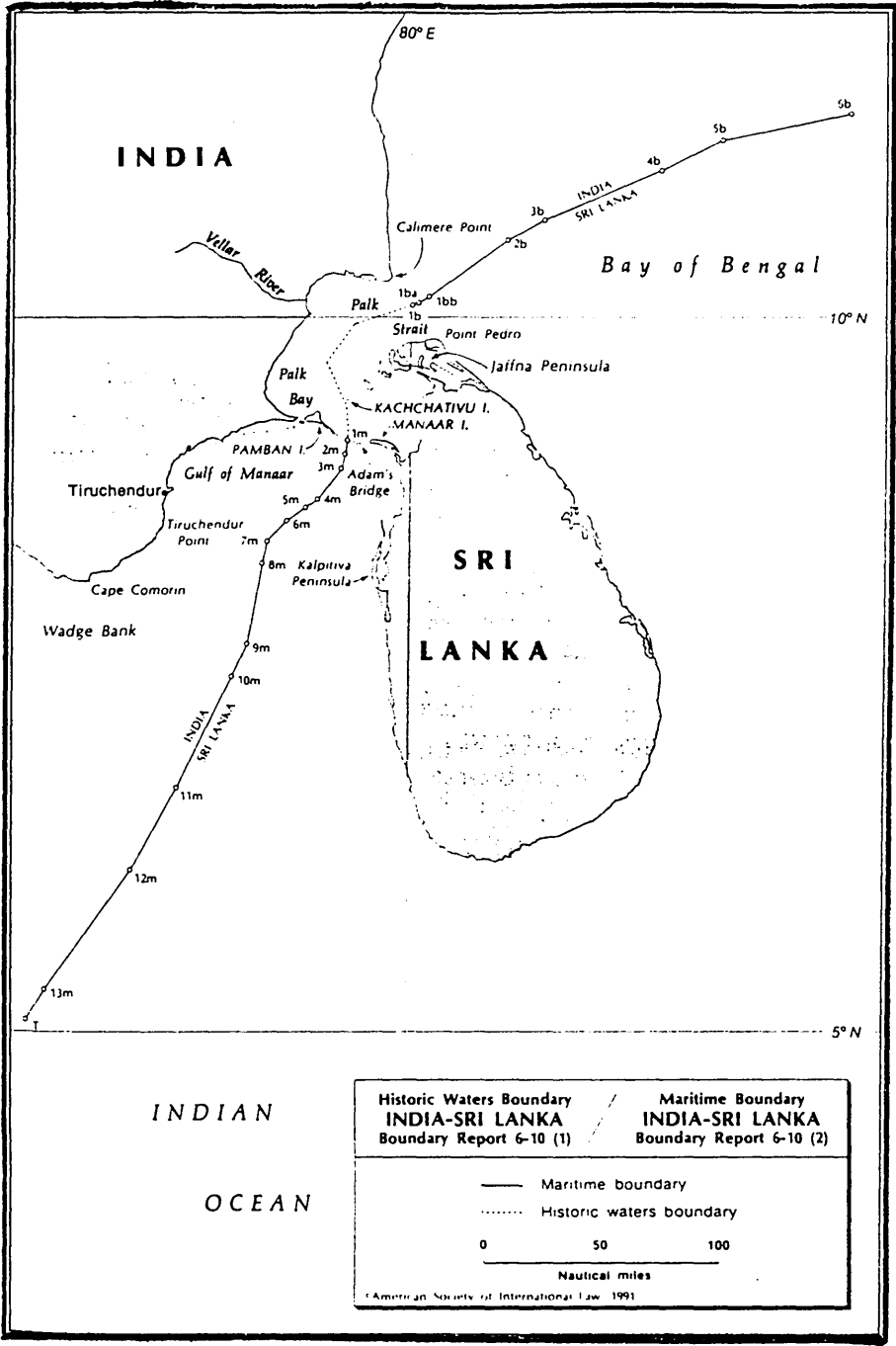


Figure: (4) Historical waters boundary between India-Sri Lanka.

Source: *International Maritime Boundaries*, at p. 1415.

Historic title in Article 12 of the 1958 Convention

In the ILC report of 1953 mention was made of fishing rights as a ground which might justify a departure from the median line.¹¹¹ However, in subsequent ILC reports reference to these rights was omitted. At the Geneva Conference of 1958 the Norwegian representative submitted a proposal, *inter alia*, to introduce the concept of ‘prescriptive usage’ or ‘historic title’ as a ground to justify a departure from the median line system.¹¹² The concept of ‘historic title’ was thereafter adopted into Article 12 at the sixteenth meeting, by 25 votes to 13 with 31 abstentions. However, Article 12 does not clarify the meaning of historic title, nor does it provide any guidelines which could be helpful in determining the scope of historic title or waters. This difficulty in clarifying the meaning of historic title has been stressed in the judgement of the *Tunisia v. Libya Case*. The World Court stated that:¹¹³

Historic titles must enjoy respect and be preserved as they have always been by long usage. In this connection...there is neither a definition of the concept nor an elaboration of the juridical regime of historic waters¹¹⁴ or historic bays¹¹⁵ ...

¹¹¹ The report of the Committee of Experts on Technical Questions Concerning the Territorial Sea, 1953, answer to question six. The report is reproduced in English in the *North Sea Cases Pleading*, vol. 1, at pp.254-8. The French version is in *ILC Yearbook* (1953), at p.77, *et seq.*

¹¹² There are two forms of prescription in the law, extinctive prescription and acquisitive prescription. We mean by the former “the loss of a claim by failure to prosecute it within a reasonable time”; by the latter “a title to something, e.g. a territory,...acquired by prescription, i.e. by the lapse of time under certain circumstances.” The latter, not the former, is relevant to the concept of historic title. See The Study, *op. cit.*, n.97, at para. 62; Oppenheim’s, *op. cit.*, n.9, at pp.705-8. On extinctive prescription, see Lauterpacht, H., *The Function of Law in the International Community*, Clarendon Press, Oxford (1933), at pp.93-4.

¹¹³ *Tunisia v. Libya Case*, at para.100.

¹¹⁴ The Court in the *Fisheries Case* defined the term “historic water” as follows: “By historic waters are usually meant waters which are treated as internal waters but which would not have that character were it not for the existence of an historic title.” See the *Fisheries Case*, at p.130.

¹¹⁵ A historic bay is a bay where a general rule of international law in regard to the bay does not apply. In other words, it is a bay in accordance with the notion of historic title and not the general rule of delimitation. For a discussion on the relation between historic waters and historic bays, see Bouchez, *op. cit.*, n.98, at p.199, Judge Torres Bernárdes in his separate opinion in the *Gulf of Fonseca Case*, ICJ Reports 1992, at p.714, para.179. For the rules for regarding an indentation in the coast as a bay, see Article 7 of the 1958 TSCZ Convention. For analysis of whether the concept of historic waters is an exception to the rules laid down in a general convention, see Clark, *op. cit.*, n.98, at pp.69-77; The Study, *op. cit.*, n.97, at pp.7-13, paras.42-79.

The status of Article 12 in customary law

Many jurists who have written about the delimitation of territorial sea have avoided discussing the issue of the status of Article 12 in customary law.¹¹⁶ This may be due to the fact that there have been few cases in this sphere, in comparison with the cases on continental shelf delimitation, which have been put before ICJ or international arbitration tribunals. Furthermore, the UNCLOS III adopted Article 12 of the 1958 Convention almost without change in the 1982 Convention as Article 15. It is noteworthy that Hungdan Chiu used this as evidence of its status as a part of the rules of customary law. He wrote that:

it may be argued that article 12 of the Convention has received prior acquiescence in the international community. This view is confirmed by the absence of challenge to the adoption of an almost identical article at UNCLOS III.¹¹⁷

In a similar manner, Prosper Weil stated that:

the delimitation of the territorial sea is governed by the equidistance/special circumstances rule, [which was established] by Article 12 of the 1958 Convention in the Territorial sea and Contiguous Zone and incorporated without any difficulty by UNCLOS III in Article 15 of the 1982 Convention. [This] rule is generally regarded as having become part of customary law for purposes of territorial sea delimitation.¹¹⁸

Supporting or rejecting this argument requires a consideration of two essential questions: was the formula in Article 12 in its original a codification of customary law? If not, has it entered into customary law since the Geneva Convention on Territorial Sea came into force in 1964?¹¹⁹ Starting with the first question, we noted at an early stage in this chapter that there were no definite pre-1958 rules of customary law governing the delimitation of territorial sea boundaries between opposite and adjacent states. It follows that Article 12 of the Geneva Convention did not, in this view, codify existing rules of customary law regarding the

¹¹⁶ Shaw, for example, did not examine the question of territorial sea delimitation as a whole, although he analysed the issue of continental shelf boundary delimitation and the status of Article 6 in customary law. See Shaw, *op. cit.*, n.25, at pp.380-7. Similarly see Churchill and Lowe, *The Law of the Sea*, Manchester University Press, New rev.ed., Manchester (1988), Chapter Ten.

¹¹⁷ Chiu, *op. cit.*, n.94, at p.7. To the same effect, see Degan, V. D., "Equitable Principles in Maritime Delimitations," *International Law at the Time of its Codification*, Essay in Honour of Roberto Ago, vol. 2, Milano-Dott.A. Giuffrè Editore (1987), at p.129.

¹¹⁸ Weil, *op. cit.*, n.24, at p.136.

¹¹⁹ For a distinction between codification and development of international law, see *Oppenheim's, op. cit.*, n.9, at pp.110-4.

delimitation of territorial sea, and the matter was regarded as an exercise in progressive development.

What remains now is to see whether or not Article 12 has since come to form a part of the general corpus of customary law. In order to look at this question, we have to consider first the rules and elements required for an article contained in a multilateral convention to be transferred into a customary norm of law. The ICJ in the *North Sea Cases* indicated these rules and elements as follows.¹²⁰

Fundamental norm creating character

In order for a provision to achieve such character, three conditions must be fulfilled:

(1) The priority (primacy) of the rule

For a rule or a formula in a multilateral convention to be regarded as forming the basis for a general rule of customary law, it should have a primacy application. If it has no such status, it would be “an unusual preface to what is claimed to be general rule of law.”¹²¹ As far as the median line is concerned, there is a prohibition in Article 12 against the extension of the boundary line beyond the median line, save where there is an agreement to that effect, or a special circumstance or historic title is present in the area of the delimitation to permit such extension. Therefore the general rule in Article 12 is the median line. The agreement between the parties, historic title and special circumstance are all exceptions to the general rule.

(2) The faculty of making reservations to the rule

In the *North Sea Cases* the Court recalled that the faculty to make reservations had been restricted for Articles 1-3 inclusive of the 1958 Convention on the Continental Shelf, but had been unrestricted in respect of the rest of the articles in the said Convention, including Article 6. The Court, therefore,

¹²⁰ *North Sea Cases*, at paras. 70-81. See also Brownlie, *op. cit.*, n.16, at pp.4-7.

¹²¹ *North Sea Cases*, at para.72.

concluded that “the convention itself....would...seem to deny to the provisions of Article 6 the same norm-creating character as...Articles 1 and 2 possess.”¹²²

This is not the case for the Territorial Sea Convention, which remained silent on the whole question of the faculty of making a reservation. So, for these matters, we can derive benefit by referring to Article 19 of the Vienna Convention on the law of Treaties of 1969,¹²³ which was worded as follows:

A State may, when signing, ratifying, accepting, approving, or acceding to a treaty, formulate a reservation unless:

- (a) the reservation is prohibited by the treaty;
- (b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or
- (c) in cases not falling under subparagraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.

Therefore, the faculty of making a reservation in the Territorial Sea Convention is permitted where the reservation is compatible with the object and purpose of the treaty.¹²⁴ So, in the case of the Territorial Sea and Contiguous Zone Convention, one might conclude that at least as a matter of form the articles of the Convention *in toto* are on the same plane. As far as Article 12 is concerned, there was only one reservation which had been made in regard to Article 12, and this by the Government of Venezuela. However, this reservation was not made in order to reject the median line system.¹²⁵

(3) The provision which is claimed to be a potential general rule should be free from any unresolved controversies

This, it can be argued, is not the case in Article 12 where the exact meaning and scope of the notion of special circumstances is still ambiguous. This

¹²² Ibid.

¹²³ For more discussion of the right of a state to make a reservation to multilateral convention, see Harris, *op. cit.*, n.6, at pp. 753-7; Sinclair, *op. cit.*, pp. 55-60; Reuter, P., *Introduction to the Law of Treaties*, Kegan Paul International, London (1995), at pp.77-84; Brownlie, *op. cit.*, n.16, at pp. 608-10.

¹²⁴ This raises a question about compatibility: whether or not the reservation becomes compatible with the “object and purpose of the treaty.” The Vienna Convention on the law of the Treaties of 1969, Brownlie held, seems to have no clear cut answer to this question and the matter is left to the appreciation of the individual state. See Brownlie, *op. cit.*, n.16, at p.611.

¹²⁵ Venezuela’s reservation was solely to assert that the following area “in the Gulf of Paria and zones adjacent thereto: the area between the coast of Venezuela and island of Aruba and the Gulf of Venezuela” should be taken as involving special circumstances. See *Multilateral Treaties Deposited with the Secretary-General*, UN, New York (1986), at p. 679.

ambiguity “may raise [some] doubts as to the potentially norm-creating character of the rule.”¹²⁶ However, this weakness is remedied to some extent by the general understanding that the presence of one of the three factors mentioned in the commentary of the ILC report of 1956, namely “any exceptional configuration of the coast, as well as the presence of islands or of navigable channels,”¹²⁷ may constitute a special circumstance.

Generality of the practice

The condition which was laid down by the Court in the *North Sea Cases* for examining the generality of state practice, is that it “should have been both extensive and virtually uniform in the sense of the provision invoked—and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved.”¹²⁸

To examine state practice in regard to Article 12 in the light of this condition, one may recall up the following factors. Thirty-three years have elapsed since the Convention came into force in 1964, and around forty-six countries have ratified the Convention. Further, the tendency in the national legislation of coastal states, since the 1958 Conference, has been to adopt the median line system or the equidistance line to determine the boundary line. This tendency is reflected in the practice of both states which are, and those which are not, parties to the 1958 Convention.¹²⁹

¹²⁶ *North Sea Cases*, at para. 72.

¹²⁷ *ILC Yearbook* (1956), vol. 2, at p. 300, para.37; *Oppenheim's, op. cit.*, n.9, at p.614.

¹²⁸ *North Sea Cases*, at para. 74.

¹²⁹ Example of this legislation are as follows: France: The 1971 law in the extending of the territorial waters. Art. 2.— India: The Maritime Zone Act of 1976. Art. 9(1).— Japan: The Law no.30 of 1977 on the Territorial Sea. Art. 1. — Pakistan: Territorial Waters and Contiguous Zone Act of 1976, Art. 7(1)(a). — The Former USSR: The 1960 Regulation on Territorial Sea, Art. 3. — Guyana: The Maritime Boundary Act of 1977, Art.34.— Republic of Korea: The Territorial Sea Act of 1977, Art. 4.— Spain: The Act no.10 of 1977 Concerning The Territorial Sea, Art. 4. — Tanzania: The Proclamation of 1973 on the Extent of the Territorial Sea.— Kuwait: Decree of 1967, Art. 4.— Uruguay: Decree of 1969.— Oman: Decree of 1972, Art.7.— Saudi Arabia: Decree of 1949, Art. 8.— Iran: The Marine Areas Act of 1993, Act.4.— Emirate of Sharjah: Supplementary Decree of 1970 Concerning the Territorial Sea of the Emirate, Article 4.— The UAE: Federal Law no.19 of 1993 in the Delimitation of the Maritime Zone. Art. 23(1).

This number of ratifications of the Convention, and the tendency to adopt the formula of the median line in national legislation, is sufficient to show that state practice has become a “settled practice” in the sense of being extensive and uniform, with evidence to suggest that a rule of customary international law has crystallized. Moreover, this uniformity and wide range of practice was fortified by the adoption of the formula of Article 12 into the 1982 Convention under Article 15, which has now entered into force.¹³⁰

*Opinio juris*¹³¹

When states apply a provision which is claimed to be a general rule of law (in this case the obligation of using the median line), they should believe that this practice or action “is rendered obligatory by the existence of a rule of law requiring it.”¹³² The mandatory status of Article 12 is demonstrated by the widespread acceptance in the national legislation of coastal states of the use the median line system, as the only method in the delimitation process, where the parties do not agree otherwise.¹³³

¹³⁰ One hundred and twenty two states have hitherto ratified the 1982 Convention, see Chapter One.

¹³¹ For further discussion on *opinio juris*, see *Oppenheim's, op. cit.*, n.9, at p.28.

¹³² *North Sea Cases*, at para. 77. See also *ibid.*

¹³³ It is worth mentioning here that it is superfluous to cite the treaties which have concluded between coastal states concerning the delimitation of the maritime boundaries, if the intention is to illustrate the general acceptance of the median line system. This is due to the fact that coastal states have the right in Article 12 to agree to be excluded from the obligation of using the median line system. This exclusion does not mean that they are rejecting the median line as a general rule in the territorial sea delimitation, it only means that they are exercising a right which had been given, in Article 12, to the coastal states. Therefore, the treaties of maritime boundary delimitation which were concluded between various numbers of coastal states are not the proper place to seek the widespread acceptance by states to the formula of the median line in Article 12. Nonetheless, states practice, i.e. the maritime delimitation agreements, still have an important role to play in the subject of maritime delimitation: “it does provide important evidence of the way in which states have dealt with peculiar geographical, historical and other factors. In this sense, states practice retains legal and practical relevance. Even though it does not reflect a principle of customary international law, it shows that a number of delimitation methods, or combinations of methods, may be employed depending on the facts and circumstances of each case.” See Bundy, R., “States Practice in Maritime Delimitation,” *Maritime Boundaries*, World Boundaries, vol. 5, Gerald Blake (ed.) (1994), at p.24. See also Charney, *op. cit.*, n.42 at p.228; Weil, *op. cit.*, n.14, at pp.120-2.

Conclusion

Article 12 of the 1958 Convention on the Territorial Sea was not in its origins or inception declaratory of a mandatory rule of customary law enjoining the use of the median line for the delimitation of the territorial sea between opposite or adjacent states. However, the subsequent practice of states in using the median line should, as we have seen, be regarded as having produced such a norm of customary law. This view was accepted in the specific context of the United Arab Emirates in the decision of the Court of Arbitration in the *Dubai/Sharjah Award* of 1981. This case, it will be recalled, concerned the land and maritime boundary delimitation between two adjacent Emirates' members of the UAE Federation. Hence the boundary between the parties does not possess an international character. Usually the applicable law in disputes such as this would be the federal law, but in the UAE there is no separate federal law on the matter of boundary delimitation between the component units of the federation. Therefore, "recourse must be made to international law"¹³⁴ or, to be precise, to customary law, because the treaty law was not applicable in the present case due to the fact that the UAE had not become party to the Geneva Convention of 1958.¹³⁵ The Court of Arbitration, nevertheless, constructed a boundary line between the two Emirates' territorial seas "according to the principles laid down in Article 12 of the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone."¹³⁶

¹³⁴ *Dubai/Sharjah Award*, at p.586, see also p. 587.

¹³⁵ *Ibid.*, at p.658.

¹³⁶ *Ibid.*, at p.663.

Delimitation of the Continental Shelf

Delimitation of the Continental Shelf

3

As was noted earlier, this chapter will be dedicated to the examination of the rules of continental shelf boundary delimitation. The discussion is of particular interest, since it will provide the rules that govern the potential delimitation of the UAE continental shelf boundary, which we shall examine in the remaining part of the thesis. At first sight, this might suggest that our discussion should be limited to the rules of customary law, since the UAE is not party to the 1958 Continental Shelf Convention or the 1982 Convention. This is entirely true. However, as we shall see, the development in the rules of customary law have not been isolated from the rules of the 1958 Convention. Rather are they intimately connected with these rules. This association between customary law and the formula in the 1958 Convention has also had some influence on the formulation of the rules of the 1982 Convention concerning the delimitation question. Therefore it is not only justifiable, but also necessary, to explain the rules of delimitation in the 1958 Convention and the 1982 Convention when examining the rules of customary law on this issue.

The concepts of special and relevant circumstances have an important role in the delimitation process. No single international decision concerning a maritime boundary delimitation has been made where such concepts have not been claimed by the parties involved. A number of factors and features have been claimed before third-party settlement as special or relevant circumstances, some of which have been accepted, some rejected. We shall examine the most common factors in terms of their being accepted or not by a third-party settlement. This chapter, therefore, has been divided into two sections: (1) the rules of continental shelf boundary delimitation; (2) the concept of special/relevant circumstances.

Section One

The rules of continental shelf boundary delimitation

The period prior to the ILC

We have seen in Chapter One that the Truman Proclamation of 1945 marked the beginning of coastal states' rights to claim exclusive jurisdiction over the resources of the sea-bed and subsoil area. The boundary of the US continental shelf, according to the Proclamation, was to be determined by the US government and other states concerned in accordance with equitable principles.¹ A number of coastal states followed the Truman Proclamation in asserting jurisdiction over the continental shelf area,² but only a small number, including the UAE,³ copied the Truman Proclamation in adopting equitable principles in the delimitation of the continental shelf. However, neither the Truman Proclamation nor the subsequent proclamations of these states adopted a practical method to be used to achieve a delimitation in accordance with such equitable principles. Therefore one may describe state practice in the delimitation of shelf boundaries in the period prior to the ILC as one characterized by vagueness and uncertainty.⁴

The work of the ILC

The uncertainty of pre-existing state practice was mirrored in the early work of the ILC from 1950 to 1953. In 1951, for instance, a draft article was put up for discussion suggesting that continental shelf boundaries be determined by agreement. Failing agreement, the parties would be under an obligation to refer the matter to arbitration to fix the boundary line according to the *ex aequo et bono*⁵ principle.⁶ The suggestion of determining the boundary by agreement was acceptable to several members of the ILC. In contrast, the obligation to have the

¹ United Nations Legislative Series, *Laws and Regulations on the regime of the High Seas*, vol.1 (1951), at pp.38-40.

² See Chapter One/Section Three.

³ Ibid.

⁴ See Brown, E.D., *Sea-Bed Energy and Minerals: The International Legal Regime*, vol.1, Continental Shelf, 2nd ed, Martinus Nijhoff Publishers, the Netherlands (1992), at p. 62.

⁵ For more discussion on the principle of *ex aequo et bono*, see Chapter Seven.

⁶ *ILC Yearbook* (1951), vol.2, at p.143.

boundary fixed by arbitration aroused considerable opposition.⁷ In 1953 a distinction was drawn between the treatment of opposite and adjacent coasts. As in the case of territorial sea delimitation, the median line system was suggested for delimitation between opposite states, and the principle of equidistance was suggested for delimitation between adjacent states.⁸ Furthermore, the departure from the median line system or the principle of equidistance was justified by the concept of special circumstance.⁹ Finally, in the 1956 report of the ILC, the formula of the median line and the equidistance principle was adopted as Article 72.¹⁰

Article 6 of the Geneva Convention on Continental Shelf

The text of draft Article 72 of the ILC final report of 1956 was incorporated into Article 6 of the 1958 Continental Shelf Convention without major revision. However, the concept of special circumstances, although it was finally adopted almost unchanged in the Convention, was one of the most controversial matters in the Geneva Conference of 1958. This controversy will be the subject of further detailed discussion in a later section of this chapter.¹¹

Article 6 of the 1958 Convention provides:

1. Where the same continental shelf is adjacent to the territories of two or more States whose coasts are opposite each other, the boundary of the continental shelf appertaining to such States shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary is the median line, every point of which is equidistant from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured.
2. Where the same continental shelf is adjacent to the territories of two adjacent States, the boundary of the continental shelf appertaining to such States shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary shall be determined by application of the principle of equidistance from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured.

Article 6 provides the following three rules for determining the continental shelf boundary: (1) a boundary line may be determined by agreement; (2) a

⁷ *ILC Yearbook* (1953), vol.1, at p.106, para.38.

⁸ *Ibid.*, at para. 37.

⁹ *Ibid.*, at p.131, para.14.

¹⁰ *ILC Yearbook* (1956), vol.2, at p.300, para.37.

¹¹ See below at pp.129-32.

boundary line may be justified by special circumstances; (3) a boundary line may be drawn in accordance with the median line or equidistance principle. Each will now be discussed in turn (except the concept of special circumstance which will be analysed thoroughly in a separate section at a later stage of the present chapter).

(1) A boundary line determined by agreement either express or de facto¹²

Parties, in the absence of rules of *jus cogens*, have complete freedom¹³ to derogate from the rules of law.¹⁴ That why Article 6 “does not indicate any criteria for determining the boundaries” by agreement.¹⁵ Hence the parties are under no obligation to adopt in their agreement the equidistance line or to seek an equitable result in the delimitation.¹⁶ However, if the parties—after they have entered into negotiations in good faith¹⁷ and “with a genuine intention to achieve

¹² This can be done, the Chamber in the *Gulf of Maine Case* said, by “the conclusion of a direct agreement, or if need be, by some alternative method, which must, however, be based on consent.” (para 89) Moreover, the provision of determining the boundary by agreement would mean in practice that “any unilateral claim for the delimitation of the continental shelf would not be regarded as valid under international law.” (See Judge Oda’s dissenting opinion in the *Tunisia v. Libya Case*, at p.246, para.144; *Gulf of Maine Case*, at para.87; Judge Shahabuddeen’s separate opinion in the *Greenland v. Jan Mayen Case*, at p.150; see also Chapter Two/Section One above.) These principles, the Chamber in the *Gulf of Maine Case* held “are principles already clearly affirmed by customary international law, principles which...are undoubtedly of general application, valid for all States and in relation to all kinds of maritime delimitation.” *Gulf of Maine Case*, at para. 90. See here the remark of Professor Brown on the Chamber interpretation: Brown, E.D., *The UN Convention on the Law of the Sea 1982, A Guide for National Policy Making, Book 3: Maritime Zones, II exclusive economic zone and continental shelf*, Commonwealth Secretariat, London (1991), at p.92.

¹³ cf. with the situation under Article 83(1) of the 1982 Convention, see below at p.118.

¹⁴ *North Sea Cases*, at para.72. See also Jiménez de Aréchaga, “The Conception of Equity in Maritime Delimitation,” *International Law at the Time of its Codification*, Essay in Honour of Roberto Ago, vol. 2, Milano-Dott.A. Giuffrè Editore (1987), at p.233; Bundy, R., “States Practice in Maritime Delimitation,” *Maritime Boundaries*, World Boundaries, vol. 5, Gerald Blake (ed.) (1994), at p.24. Interestingly, this complete freedom has lead some scholars to suggest that “the reference to delimitation by agreement is, strictly speaking, unnecessary.” See Caflisch, L., “Maritime Boundary Delimitation,” 11 *EPIL* (1989), at p.213.

¹⁵ See Judge Oda’s separate opinion in the *Greenland v. Jan Mayen Case*, at p.103, para.51. Elsewhere Judge Oda held that “the rule calling for delimitation by agreement remains simply a rule concerning procedure and cannot constitute a principle or rule of delimitation.” Judge Oda, *op. cit.*, n.12, at p.194, para. 60.

¹⁶ Judge Shahabuddeen, *op. cit.*, n.12, at p.150; Jennings, R.Y., “The Principles Governing Marine Boundaries,” *Staat und Völkerrechtsordnung, Festschrift für Karl Doebling* (1989), at p.402.

¹⁷ For further discussion of the principle of good faith, see Fitzmaurice, G., *The Law and Procedure of the International Court of Justice 1947-59*, Cambridge University Press, Cambridge (1995), at pp.800-29; Cheng, B., *General Principles of Law as applied by International Court*

a positive result”¹⁸—fail to reach an agreement, and the matter is thus to be referred to judicial settlement, there would be no similar freedom afforded to the court or tribunal. Rather its power should, in theory, be limited, in the absence of special circumstances, to the median line-equidistance principle that is enunciated in Article 6¹⁹—where the 1958 Convention is applicable between the parties—whether this application would lead to an equitable result or not.²⁰ However, as we shall see, the general tendency in international decision is to equate Article 6 with the rules of customary law. This has given the World Court or *ad hoc* tribunal the power to apply equity, and thus to decide an equitable result where the application of the formula of Article 6 would produce, in the view of the court, an inequitable result.²¹

(2) A boundary line drawn in accordance with the median line or equidistance principle

Article 6 distinguished between the case of opposite states and that of adjacent states. In the former the boundary line is the median line, whereas in the case of the latter the boundary line is a lateral equidistance line.²² On various occasions, however, it was alleged that “a median line will normally effect a broadly equitable delimitation [but] a lateral equidistance line...may not infrequently result in an inequitable delimitation by reason of the distorting effect of individual geographical features.”²³ Figure 4 below illustrated this distorting

and Tribunals, Grotius Publications, Cambridge University Press, Cambridge (1994), at pp.105-60; White, G., “The Principle of Good Faith,” *The United Nations and the Principles of International Law, Essays in memory of Michael Akehurst*, Lowe V. and Warbrick C. (eds.), Routledge, London (1996), at pp.230-55.

¹⁸ *Gulf of Maine Case*, at para. 87.

¹⁹ Brown, *op. cit.*, n.4, at p.343; O’Connell, D.P., *The International Law of the Sea*, vol.1, Shearer (ed.), Clarendon Press, Oxford (1982), at p.700.

²⁰ Judge Shahabuddeen, *op. cit.*, n.12, at p.157.

²¹ *Anglo/French Arbitration*, at para. 84. See also Brown, *op. cit.*, n.4, at p.355. For a comment on the Court view, see Jennings, *op. cit.*, n.16, at p.400 and p.402.

²² For the advantages of using the equidistance line, see *North Sea Cases*, at paras.22-3.

²³ *Anglo/French Arbitration*, at para.95; *North Sea Cases*, at paras.58 and 89; Brown, E.D., *The Legal Regime of Hydrospace*, Stevens & Sons, London (1971), at p.72; O’Connell, *op. cit.*, n.19, at pp.684-5. See Whiteman, M.M., *Digest of International Law*, vol. 4, Department of State Publication, Washington (1965), at p.908. For a different view, see Weil, P., *The Law of Maritime Delimitation-Reflection*, Grotius Publications Limited, Cambridge (1989), at p.247.

effect caused by an island belonging to Oceania and situated opposite to Australis.

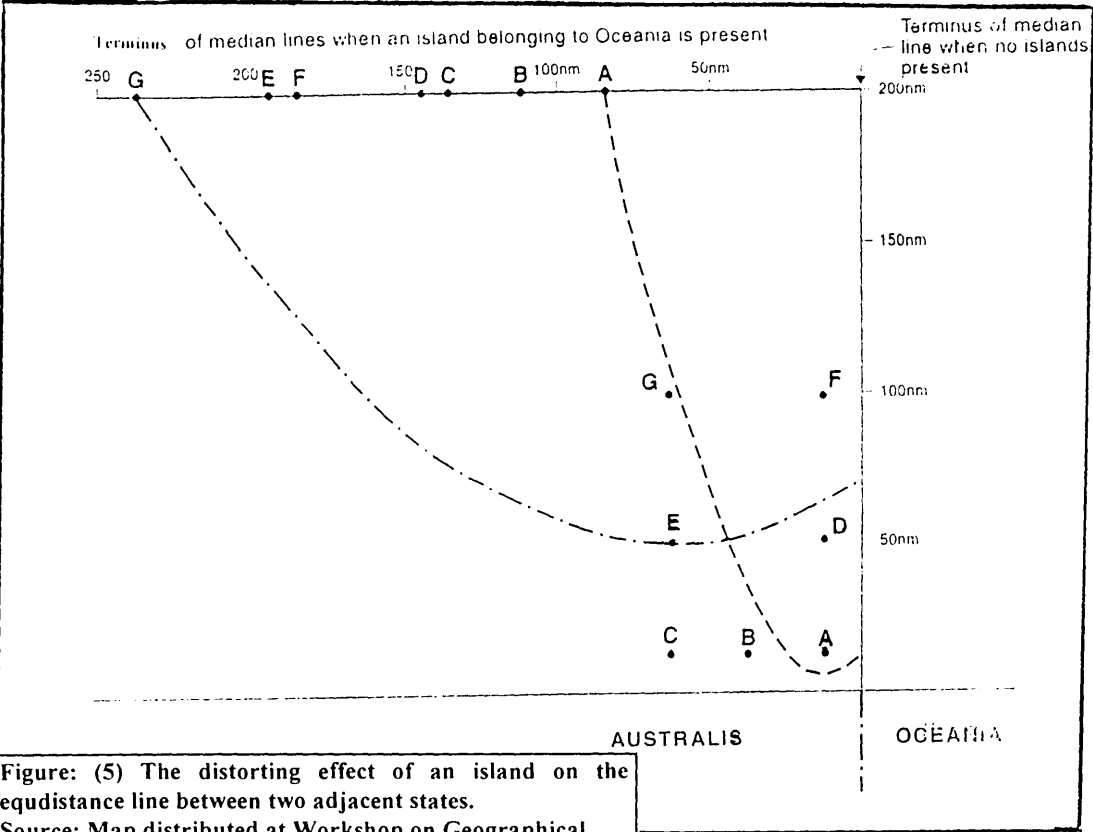


Figure: (5) The distorting effect of an island on the equidistance line between two adjacent states.
Source: Map distributed at Workshop on Geographical and Technical Considerations in Maritime Boundary Delimitations. University Of Durham. International Boundary Research Unit. 17 July 1996.

Despite the differences between the median line system and the principle of equidistance one may have thought that they both have, in the absence of agreement and special circumstances, under Article 6 the status of mandatory rules, the former in regard to the delimitation between opposite states and the latter in regard to adjacent states.²⁴ This mandatory status is to be used as a starting point in the delimitation process, which then may be adjusted where necessary by special circumstances.²⁵ This could give the feeling that the median line-equidistance principle is the general rule and special circumstances an exception to this rule.²⁶

However, such an interpretation was not upheld by the Court of Arbitration in the *Anglo/French Arbitration*, where Article 6 was applied for the first time in international adjudication, both States (UK and France) being parties to the 1958 Convention. The Court's own interpretation was that the formula of Article 6 has created a combined equidistance-special circumstances rule, which means that "the obligation to apply the equidistance principle is always one qualified by the condition 'unless another boundary line is justified by special circumstances.'"²⁷

The differences between the two interpretations are: (1) under the first the burden of proof falls upon the state alleging special circumstances.²⁸ Under the second interpretation, however, there is no burden of proof on the claiming state, since special circumstances and the equidistance principle combine to form one single rule;²⁹ (2) under the interpretation of the court the equidistance principle

²⁴ *Gulf of Maine Case*, at para.118; *Libya v. Malta Case*, at para. 65; Judge Gros's dissenting opinion in the *Gulf of Maine Case*, at p.387, para.46; Judge Weeramantry's separate opinion in the *Greenland v. Jan Mayen Case*, at p.264, para.195; Judge Shahabuddeen, *op. cit.*, n.12, at p.157.

²⁵ Judge Shahabuddeen, *op. cit.*, n.12, at pp.144-7 and p.149; O'Connell, *op. cit.*, n.19, at pp.699-705; Brown, *op. cit.*, n.4, at p.107.

²⁶ Brown, *op. cit.*, n.4, at p.107; O'Connell, *op. cit.*, n.19, at p.705. An opposite view was held by Judge Fischer in his dissenting opinion in the *Greenland v. Jan Mayen Case*, at pp.305-6, paras.6-8.

²⁷ *Anglo/French Arbitration*, at para.70. In other words, as the tribunal in the *France/Canada Award* said, it has not provided "for equidistance 'tout court' but equidistance when there are no special circumstances." *France/Canada Award*, at para. 41. See Judge Shahabuddeen's comment on this single rule. Judge Shahabuddeen, *op. cit.*, n.12, at p.139. Similarly, see the comment of Professor Bowett in his book, *The Legal Regime of Islands in International Law*, Oceana Publications Inc., New York (1979), at pp.149-151. See below for more discussion at pp.115-7.

²⁸ Brown, *op. cit.*, n.4, at p.355.

²⁹ Professor Briggs's declaration to the Award, 54 *ILR*, at p.126.

has no special status. Its application to any particular case is qualified by the condition that there are no special circumstances which may require a departure from the equidistance line. Whereas under the first interpretation the equidistance principle should be used as a starting point, that may be adjusted at a later stage. These differences, O'Connell held, "may appear to be verbal, but psychologically it is important because of the order in which the concepts are arranged diplomatically or judicially."³⁰

Thus, in summary, we can make the following observation about the formula in Article 6. We have seen that the treaty obligation to apply the median line or the equidistance principle can be excluded in two cases: (1) where the parties reached an agreement; (2) where special circumstances are present in the delimitation area. Otherwise parties to the 1958 Convention should adapt the median line or the equidistance principle as the boundary line between their respective continental shelf areas.³¹ The Court in the *Anglo/French Arbitration*, as noted, added one more condition for the obligation to apply the equidistance line; this was, where no other line is justified by special circumstances.³²

Delimitation of the continental shelf in customary law

A dispute arose in the North Sea region between Denmark, the Netherlands and the Federal Republic of Germany (FRG), concerning the delimitation of their respective continental shelf boundaries. The Netherlands and Denmark were parties to the Geneva Convention of 1958. By way of contrast, the FRG was not. The Netherlands and Denmark insisted on the use of the equidistance principle, which was expressed in Article 6(2) of the Geneva Convention, on the ground that it had come into the general corpus of international law. However, the FRG rejected such an argument and assumed that the delimitation of the continental shelf between the parties was governed by "the principle that each coastal state is entitled to a just and equitable share."³³ The court in the *North Sea Cases* was

³⁰ O'Connell, *op. cit.*, n.19, at p.705.

³¹ Judge Shahabuddeen, *op. cit.*, n.12, at pp.157-9.

³² See below for more discussion at pp.116-8.

³³ *North Sea Cases*, at para.15.

charged with identifying the principles and rules of international law that “are applicable to the delimitation as between the Parties of the area of the continental shelf in the North Sea which appertain to each of them.”³⁴ Starting with the argument of the Netherlands and Denmark that the equidistance principle had become part of customary law, the court concluded that:

the Geneva Convention was not in its origins or inception declaratory of a mandatory rule of customary international law enjoining the use of the equidistance principle for the delimitation of the continental shelf areas between adjacent States; neither has its subsequent effect been constitutive of such a rule; and that States practice up-to-date has equally been insufficient for the purpose....[Thus] the use of the equidistance method is not obligatory for the delimitation....in the present [case].³⁵

Having stated that Article 6(2) had not passed into the general corpus of international law, the Court went on to identify the legal rules and principles of customary law that could be said to govern the delimitation of the continental shelf, and the method, if any, that could be used in drawing the boundary line.³⁶ These legal rules and principles are: (a) the parties are under an obligation to enter into negotiations with a view to arriving at an agreement; (b) the parties are under an obligation to take account of all circumstances, and to ensure that equitable principles are applied; (c) the continental shelf of any state must be the natural prolongation of its land territory.³⁷ We shall now go on to examine these ideas more closely.

(1) The obligation to enter into negotiations

One of the fundamental norms of the Charter of the United Nations is that states “shall settle their international disputes by peaceful means”,³⁸ one of these being to “seek a solution by negotiations.”³⁹ This obligation, in the context of the continental shelf, was reinforced by Article 6 of the 1958 Convention, and it was

³⁴ Article 1 of the special agreement to submit the two cases to the Court. See *ICJ Reports 1969*, at p.6.

³⁵ *North Sea Cases*, at paras.81-2, see also para.69. Professor Brown, however, criticized the Court finding that Article 6 had not been established in customary law. See Brown, *op. cit.*, n.4, at p.74. See also Weil, *op. cit.*, n.23, at pp.143-4.

³⁶ See the reaction of Sir Report Jennings to the Court decision; Jennings, *op. cit.*, n.16, at pp.399-400.

³⁷ *North Sea Cases*, at para. 85.

³⁸ Article 2(3) of the Charter of the United Nations.

³⁹ Article 33 of the Charter of the United Nations.

confirmed by the World Court in the *North Sea Cases*. In the latter case, however, the obligation to negotiate the boundary was linked with the concept of equitable principles.⁴⁰ In addition, the Court in the 1969 case imposed upon the parties the obligation that the negotiation should be meaningful and that there should not be the insistence, from either side, upon its “own position without contemplating any modification of it.”⁴¹

Notwithstanding, the obligation to enter into negotiations with a view to arriving at an agreement in accordance with equitable principles “should not...be taken to mean that delimitation by agreement is the only possible solution, for otherwise no settlement could ever be reached in the event of a failure to agree,”⁴² nor should it be understood to “imply an obligation to reach an agreement.”⁴³ Rather, the obligation to enter into negotiations, like the case under Article 6, means that that obligation is one of the means which, in so far as the case of continental shelf delimitation is concerned, has priority of use before any of the other methods specified in Article 6 of the 1958 continental shelf Convention.

(2) Relevant circumstances

The idea of the uniqueness of each boundary, and that each case, therefore, should be considered and judged on its own merits, lead the Court in the *North Sea Cases* to assert that the equitable delimitation for any case could only be achieved by the consideration of all relevant circumstances which are present in the area concerned.⁴⁴ The Court went on to list some relevant circumstances which should be taken into account in order to reach an equitable result. These factors include:⁴⁵ (1) the general configuration of the coasts of the parties, as well

⁴⁰ See below at p.103. For an observation on the Court linking the obligation to negotiate with the concept of equitable principles. see Jennings, *op. cit.*, n.16, at pp.402-3.

⁴¹ *North Sea Cases*, at para.85(a). See also Charney, J. I., “Progress in International Maritime Boundary Delimitation Law,” 88 *AJIL* (1994), at p.228.

⁴² Caflisch, *op. cit.*, n.14, at p. 216.

⁴³ The PCIJ Advisory Opinion of 1931 on the *Railway Traffic Lithuania and Poland*. See *World Court Reports, A collection of the Judgements, Orders and Opinions of the Permanent Court of International Justice*, Manley Hudson (ed.), vol. II (1927-1939), no 34, at p.756. Also published in *PCIJ Reports Series A/B-N°42*, at pp. 108-23.

⁴⁴ *North Sea Cases*, at para.101(C)(1).

⁴⁵ *Ibid.*, at para.101(D). See below for more discussion on the concept of relevant circumstances.

as the presence of any special or unusual features; (2) the physical and geological structure, (3) the unity of any deposit; (4) the element of a reasonable degree of proportionality.

(3) Equity and equitable principles

The President Truman Proclamation, as noted earlier, was the first of its kind on the subject of the continental shelf. The Proclamation adopted the concept of equitable principles to determine the boundary of the US continental shelf. This concept, however, was not embodied in the 1958 Continental Shelf Convention.⁴⁶ In 1969 the World Court in the *North Sea Cases* reintroduced the equitable principles saying that: “delimitation is to be effected by agreement in accordance with equitable principles.”⁴⁷ The Court, in addition, asserted that there is “a rule of law that calls for the application of equitable principles.”⁴⁸ Subsequent international decisions on maritime boundary delimitation have emphasized the important role of equity and equitable principles in the delimitation of a shelf boundary.⁴⁹

The characteristics of equity

In general, rules of law have certain common characteristics. These usually include some element of consistency and a degree of predictability.⁵⁰ In contrast, “equity”, which has been described on various occasions as a part of the law, is

⁴⁶ This is not to suggest that equity has no role in the formula of delimitation in the 1958 Convention. Indeed the adoption of special circumstances rule, as “an escape clause”, in Article 6 was to avoid any inequitable result in the delimitation. see Jennings, *op. cit.*, n.16, at p.400.

⁴⁷ *North Sea Cases*, at paras. 101(C)(1) and 90.

⁴⁸ *Ibid.*, at para.88. For a comment on the Court view, see Jennings, *op. cit.*, n.16, at pp.400-1.

⁴⁹ The court in the *Libya v. Malta Case*, for example, held that: “The normative character of equitable principles applied as a part of general international law is important because these principles govern not only delimitation by adjudication or arbitration, but also, and indeed primarily, the duty of parties to seek first a delimitation by agreement, which is also to seek an equitable result.” *Libya v. Malta Case*, at para.46. See also *Tunisia v. Libya Case*, at paras.111-2. Moreover, the equitable principles for delimitation had not only been accepted in customary law, but also, as we shall see, in Article 83 of the 1982 Convention.

⁵⁰ *Libya v. Malta Case*, at para.45. This predictability, however, would be diminished, where there is a rule of law allowing a departure from the legal rules, e.g., the concept of special circumstances in Article 6. See Lowe, V., “The Role of Equity in International Law,” 12 *The Australian Year Book of International Law* (1992), at p.75.

characterized by vagueness, uncertainty and unpredictability.⁵¹ Moreover, there is no clear cut definition of equity,⁵² nor are there guidelines on how to use equity in shelf delimitation.⁵³ For example, in the *North Sea Cases*, the Court has been criticized as having regarded “the inequalities caused by the differences between coastal and landlocked states, or between states with long and short coastlines, as facts of nature which have to be accepted while the fact that one state’s coastline is straight or convex, and another’s is concave is ‘unnatural’”,⁵⁴ and thus it requires adjustment to abate the inequity.

However, having highlighted some negative aspects in the use of the concept of “equity”, it is necessary to present its positive side. Using “equity” provides some kind of flexibility which gives a judge or arbitrator the chance to perform more easily a corrective and “a constructive role in the application of the law.”⁵⁵

*The types of equity*⁵⁶

The Court in the *North Sea Cases* distinguished equity, which it is under an obligation to apply as a part of international law,⁵⁷ from a decision *ex aequo et*

⁵¹ See Brown, *op. cit.*, n.4, at pp.358-9; Judge Weeramantry, *op. cit.*, n.24, at p.216, para.12.

⁵² Equity was said to be synonymous with the meaning of “fair” or “reasonable”. See Lauterpacht, E., *Aspects of the Administration of International Justice*, Lauterpacht Memorial Lectures, Research Centre for International Law, University of Cambridge, Grotius Publications Limited, Cambridge (1991), at p. 118; Brownlie, I., *Principles of Public International Law*, 4th ed, Clarendon Press, Oxford (1990), at p.62; *Oppenheim’s International Law*, 9th ed., vol. I, Peace, Jennings and Watts (eds.), Longman, London (1996), at p.43. See also the *Anglo/French Award*, at para. 100; *Tunisia v. Libya Case*, at para. 72; *Gulf of Maine Case*, at paras.115, 196 and 220. Frank suggested the following definition for fairness. He wrote that fairness is “ a human, subjective, contingent quality which merely captures in one word a process of discourse, reasoning, and negotiation leading, if successful, to an agreed formula located at a conceptual intersection between various plausible formulas for allocation.” See Frank, T., *Fairness in International Law and Institutions*, Clarendon Press, Oxford (1995), at p.14.

⁵³ It worth noting that a number of judges in the North Sea Case criticised the introduction of the notion of equity into the jurisprudence of the World Court. See for example the dissenting opinion of vice-president Koretsky to the case, *ICJ Reports 1969*, at p.166.

⁵⁴ Higgins, R., *Problems and Process, International Law and How We Use It*, Clarendon Press, Oxford (1994), at p.226.

⁵⁵ Lauterpacht, *op. cit.*, n.52, at p.117; Jennings, *op. cit.*, n.16, at p. 401; Lowe, *op. cit.*, n.50, at pp.73-4.

⁵⁶ For further discussion on the types of equity, see Lowe, *op. cit.*, n.50, at pp. 56-67; Akehurst, M., “Equity and General Principles of Law,” 25 *ICLQ* (1976), at pp.801-7; Lauterpacht, *op. cit.*, n.52, at pp.17-8.

⁵⁷ Hence, no special authority is necessary for its application. See Lowe, *op. cit.*, n.50, at p.81; *Oppenheim’s, op. cit.*, n.52, at p.449; Akehurst, *op. cit.*, n.56, at pp.802-5; Schwarzenberger and

bono.⁵⁸ The difference between the two notions, says Scheuner, “lies in the attitude toward rules of law. The judge who refers to equity stays within the borders of existing law [even though the law be modified]. The judge deciding *ex aequo et bono* wins a greater freedom which dispenses him to some extent from the legal order.”⁵⁹

This distinction has been endorsed by subsequent international decisions.⁶⁰ A decision *ex aequo et bono* is an exercise of discretion which “permits the judge to set aside existing rules of law” to reach an objective justice.⁶¹ So it is completely outside the applicable law, and the court or tribunal is not allowed to rest its decision upon that principle without an agreement from the parties concerned.⁶² However, when the parties so agree, they release the adjudicative body “from the need to reach a decision on the basis of law.”⁶³ The repeated statement by the Hague Court and arbitral tribunal that the application of equity and equitable principles is not a decision *ex aequo et bono*, had been intended “to make an impression that it deals strictly and impartially on law.”⁶⁴

The application of equity

It is necessary to examine the issue of who is in charge of applying “equitable principles” and “equity”: is it the state or a third-party settlement (a judge,

Brown, *A Manual of International Law*, 6th ed., Professional Books Limited, Abingdon (1976), at p.197.

⁵⁸ *North Sea Casess*, at para.88.

⁵⁹ Scheuner, U., “Decision *ex aequo et bono* by International Courts and Arbitral Tribunals,” *International Arbitration Liber Amicorum for Martin Domke*, Pieter Sanders (ed.), the Netherlands (1967), at p.282. See also Judge Shahabuddeen, *op. cit.*, n.12, at p.194; Habicht, M., *The Power of the International Judge to Give A Decision Ex Aequo Et Bono*, Constable & Co Ltd, London (1935), at p.68.

⁶⁰ *Tunisia v. Libya Case*, at para.71; *Gulf of Maine Case*, at paras.59 and 112; *Libya v. Malta Case*, at para. 45. See also Judge Weeramantry, *op. cit.*, n.24, at p.218.

⁶¹ Habicht, *op. cit.*, n.59, at p.88.

⁶² Article 38(2) of the statutes of the International Court of Justice. See also *North Sea Casess*, at para. 88. For further discussion on a decision *ex aequo et bono*, see Chapter Seven.

⁶³ O’Connell, *op. cit.*, n.19, at p.695. See also *Swiss-French Free Zones Case*, PCIJ Reports Series A-N° 24, at p.10; *Tunisia v. Libya Case*, at para. 71.

⁶⁴ Degan, V. D., “Equitable Principles in Maritime Delimitations,” *International Law at the Time of its Codification*, Essay in Honour of Roberto Ago, vol. 2, Milano-Dott.A. Giuffrè Editore (1987), at p.127. See here Professor Miyoshi remark on the Court’s distinguishing between equity and *ex aequo et bono*; Miyoshi, M., *Consideration of Equity in the Settlement of Territorial and Boundary Disputes*, Martinus Nijhoff Publishers, the Netherlands (1993), at p.192.

arbitrator or conciliator)? The latter, not the former, is required by international law to act in accordance with the “equitable principles” and “equity”.⁶⁵ The former, i.e. states, are only required, in law, to enter into negotiations in order to conclude an agreement. The Court in the *North Sea Cases* added that “delimitation is to be effected by agreement in accordance with equitable principles.”⁶⁶ It should not, however, be assumed that the content of the agreement is “pre-determined by equitable principles. Such a conclusion would run counter to the freedom of States to enter or to decline to enter into treaties and freely to determine their content. If it were otherwise, the equitable principles referred to previously would have the quality of *jus cogens*, which is certainly not the case.”⁶⁷

To conclude, states, although under an obligation to enter into negotiations, are not obliged to apply equitable principles to the elaboration of any resulting agreement.⁶⁸

Reaching an equitable result

The International Court of Justice and *ad hoc* arbitration bodies have at all times insisted upon the idea that the delimitation should be dealt with according to equitable principles, in order to arrive at an equitable result.⁶⁹ Two questions arise; firstly, what are equitable principles? Secondly, what is an equitable result in the delimitation? The former consists of the rules and principles which lead to

⁶⁵ Lauterpacht, *op. cit.*, n.52, at p.119.

⁶⁶ *North Sea Cases*, at paras.101(C)(1) and 90. See the remark of Sir Robert Jennings on the Court dictum; Jennings, *op. cit.*, n.16, at pp.402-3.

⁶⁷ Caflisch, *op. cit.*, n.14, at p.216. Judge Oda in his separate opinion in the *Greenland v. Jan Mayen Case* wrote that: “Agreement between States is simply a result of diplomatic negotiations and is reached by the free will of the States concerned...The deciding factors in such diplomatic negotiations are simply negotiating powers and the skills of each State’s negotiator as well as the position, geographical and other, of each State.” See Judge Oda, *op. cit.*, n.15, at p.108, para.67.

⁶⁸ Judge Gros, *op. cit.*, n.24, at p.370, para.16. See also Judge Shahabuddeen, *op. cit.*, n.12, at p.150.

⁶⁹ The *North Sea Cases*, at paras. 101(C)(1) and 90. It is interesting to note that the term equity was invoked to describe the result and the means to be used to arrive at this result. Indeed, the Court itself acknowledged this in the *Tunisia v. Libya Case*, and asserted that it was not entirely satisfied with that use of the term equity; see para. 70 of the judgement.

an equitable result.⁷⁰ The latter is a result which comes from examining, in the light of equitable requirements, the circumstances in the area concerned.⁷¹ Because the circumstances in every case are different from the next case, what constitutes an equitable result in one case may be inequitable in another.⁷² Sir Robert Jennings described the concept of an equitable result as “a decision based upon nothing more than the Court’s subjective appreciation of what appears to be a ‘fair’ compromise of the claims of either side.”⁷³

But how does the court or arbitral tribunal reach an equitable result for the delimitation? Through an unexplained operation the court or arbitral tribunal appears to start the delimitation process by choosing a “boundary line which they believe to be ‘equitable’.”⁷⁴ Then they support that boundary line by selecting principles designed to achieve it. The principles used in this process are labelled as ‘equitable principles’.⁷⁵ An actual example may be found in the *Dubai/Sharjah Award*. The Court of Arbitration in this award asserted from the beginning that its task was to draw a new maritime boundary between the two parties by constructing an equidistant line between them.⁷⁶ The court however did not elaborate on the reasons why its task was to apply, for the delimitation between Dubai and Sharjah, the equidistance method, which is expressed in Article 6(2) of the 1958 Convention. This was despite the fact that the parties in the dispute were not parties to the Geneva Convention,⁷⁷ and the fact that the equidistance method had been rejected as having the status of customary international law.⁷⁸ The reasons for this recourse was probably because the two parties were not in dispute about the use of the equidistance method.⁷⁹

⁷⁰ *Tunisia v. Libya Case*, at para.70; *Libya v. Malta Case*, at para.45. See also below for further discussion on equitable principles.

⁷¹ *Tunisia v. Libya Case*, at para.71.

⁷² Higgins, *op. cit.*, n.54, at p.225.

⁷³ Jennings, R.Y., “Equity and Equitable Principles,” 42 *Ann Suisse De Droit International* (1986), at p.30. And see Jennings, *op. cit.*, n.16, at p.404.

⁷⁴ *Ibid.*, at p.31. To the same effect, see Weil, *op. cit.*, n.23, at p. 287.

⁷⁵ Higgins, *op. cit.*, n.54, at p.225; Jennings, *op. cit.*, n.73, at p.31.

⁷⁶ *Dubai/Sharjah Award*, at p.654.

⁷⁷ *Ibid.*, at p.656 and p.658.

⁷⁸ *North Sea Cases*, at paras.69, 81 and 82.

⁷⁹ *Dubai/Sharjah Award*, at pp.555-9.

Equitable principles

These are criteria⁸⁰ or norms in the light of which the various special/relevant circumstances in the delimitation area should be weighed and evaluated in order to reach an equitable result for the delimitation.⁸¹ Applying these principles a judge or arbiter would choose the proper weight that should be given to a factor constituting a special/relevant circumstance.⁸² Hence, equitable principles, in the words of Professor Weil, are the filter through which the court can determine how much effect should be given to special/relevant circumstances, and how much a provisional line needs to be adjusted to reach an equitable result.⁸³ How this evaluation and balancing up can be done is still not completely explained.⁸⁴ Further, international decisions have not laid down any clear rules to determine what is constitute an equitable principle and what is not.⁸⁵

In the literature equitable principles have been seen by some writers, e.g. Legault and Hankey, as “a means of achieving an equitable result.”⁸⁶ Higgins speaks of equitable principles as “no more than a compendium of somewhat disparate principles.”⁸⁷ Further, the factors that are termed equitable principles are the tools whereby the court or tribunal “make the choice to achieve justifiable and desirable ends;”⁸⁸ neither the tools nor the ends being articulated. Rather are they hidden behind the terms equitable principles and equitable result.⁸⁹ Some examples of equitable principles, that have been spelt out in certain cases, are:

⁸⁰ The Chamber in the *Gulf of Maine Case* preferred to use the term “equitable criteria” instead of ‘equitable principles’. See para.89 of the decision.

⁸¹ *Anglo/French Arbitration*, at para.79; *Tunisia v. Libya Case*, at paras.110 and 71. See also Judge Jiménez de Aréchaga’s separate opinion in the *Tunisia v. Libya Case*, at p.106, para.24; Judge Weeramantry, *op. cit.*, n.24, at pp.247-9, paras.122-8; Jiménez de Aréchaga, *op. cit.*, n.14, at p.232.

⁸² This is because “the problem of the relative weight to be accorded to different considerations naturally varies with the circumstances of the case.” *North Sea Cases*, at para. 93.

⁸³ Weil, *op. cit.*, n.23, at p.211.

⁸⁴ An example of the balancing process was suggested in five separate steps by Charney, J. I., “Ocean Boundaries between Nations: A theory for Progress,” 78 *AJIL* (1984), at pp.596-8.

⁸⁵ *Gulf of Maine Case*, at para.157; Degan, *op. cit.*, n.64, at pp.113-20; Lowe, *op. cit.*, n.50, at pp.78-9.

⁸⁶ Legault and Hankey, “From Sea to Seabed: The Single Maritime Boundary in the Gulf of Maine Case,” 79 *AJIL* (1985), at p.967.

⁸⁷ Higgins, *op. cit.*, n.54, at p.227.

⁸⁸ *Ibid.*

⁸⁹ *Ibid.* To the same effect, see Charney, *op. cit.*, n.84, at p.589.

“equity does not necessarily imply equality;”⁹⁰ “there is no question of completely refashioning nature;”⁹¹ “all States are equal before the law”⁹²; “the principle of non-encroachment on the natural prolongation of the territory of another state.”⁹³

An equitable principle, Professor Weil held, does not “arise from any natural or logical necessity; it is the result of a legal choice.”⁹⁴ The court or tribunal would choose a principle which appears to be equitable in a particular case.⁹⁵ This equitableness “must be assessed in the light of its usefulness for the purpose of arriving at an equitable result.”⁹⁶ Hence a particular principle which is equitable in one case might not be in another.⁹⁷ To avoid narrowing the freedom of judicial decision-making there has been no attempt made to catalogue equitable principles that might be applicable to all cases.⁹⁸

To sum up, equitable principles provide the framework within which special/relevant circumstances can play their role in the delimitation process. Equitable principles, without special/relevant circumstances, would be seen as “a

⁹⁰ *North Sea Cases*, at para. 91.

⁹¹ *Ibid.*

⁹² *Libya v. Malta Case*, paras. 46 and 54.

⁹³ *North Sea Cases*, at para.101(C)(1). For more examples of equitable principles, see *Gulf of Maine Case*, at para.157; Kwiatkowska, B., “The ICJ Doctrine of Equitable Principles Applicable to Maritime Boundary Delimitation and its Impact on the International Law of the Sea,” *Forty Years International Court of Justice: Jurisdiction, Equity and Equality*, Bloed and Van Dijk (eds.), Europa Instituut Utrecht, the Netherlands (1988), at pp.157-8.

⁹⁴ Weil, *op. cit.*, n.23, at p.212. Moreover, Hugh Thirlway suggested that an equitable principle “is a principle, [which] need not be directly related to the result in a specific case. Furthermore, it can be a principle of international law of a particular category, labelled for convenience ‘equitable’.” See Thirlway, H., “The Law and Procedures of the International Court of Justice 1960-1989, Part Six,” 65 *BYBIL* (1994), at p.7. See also Degan, *op. cit.*, n.64, at p.134.

⁹⁵ Judge Weeramantry, *op. cit.*, n.24, at p.250, para.137.

⁹⁶ *Tunisia v. Libya Case*, at paras.70 and 71. The Court went on to say: “It is not every such principle which is in itself equitable; it may acquire this quality by reference to the equitableness of the solution. The principles to be indicated by the Court have to be selected according to their appropriateness for reaching an equitable result.” See *North Sea Cases*, at paras.90 and 92. It is worth mentioning here that a principle may “prove equitable in some way independently of the equitableness of the result.” See Thirlway, *op. cit.*, n.94, at p.11.

⁹⁷ *Gulf of Maine Case*, at para.158; Degan, *op. cit.*, n.64, at p.125. See also Goralczyk, W., “Maritime Boundary Delimitation-Comments,” *Forty Years International Court of Justice: Jurisdiction, Equity and Equality*, Bloed and Van Dijk (eds.) Europa Instituut Utrecht, the Netherlands (1988), at p.166.

⁹⁸ The Court in the *Tunisia v. Libya Case* stressed in this regard that: “no particular attempt should be made here to over-conceptualise the application of the principles and rules relating to the continental shelf.” See para.132.

conceptual framework devoid of content.”⁹⁹ Similarly, special/relevant circumstances without equitable principles are silent factors.¹⁰⁰ Therefore, the two notions are necessary for each other in order for each to play its role in the delimitation.

The role of equity in determining the boundary line in continental shelf delimitation

There are two distinct roles which have been suggested for equity. Firstly, equity has a corrective and a mitigating role in the delimitation, that is to say it helps to avoid inequitable results which would occur from the application of general rules.¹⁰¹ Sir Robert Jennings in explaining this role wrote that:

equity will...modify a gross inequality which is the result the gearing of a particular method of drawing the line and the particular geographical circumstances; an equality which is not the inequality of nature, but the inequality produced by a method which results in what is demonstrably a distortion when applied to particular geographical circumstances. And the test for such a modificatory role for equity is not judicial discretion but the judicial application of known and recognized equitable criteria in order to reach a result in accordance with equitable principles...¹⁰²

To the same effect, Blecher stated that equity “is performing the function of correcting the incorrect results obtained from using the wrong tools—or misusing the right ones—in effecting a delimitation of continental shelf.”¹⁰³ However, the corrective and mitigating role for equity has been rejected by some international jurists. Judge Jiménez de Aréchaga, for example, stated that equity has no corrective role in shelf delimitation, because there is no “general rule of law which is to be moderated or corrected in its concrete application.”¹⁰⁴

⁹⁹ Weil, *op. cit.*, n.23, at p.212.

¹⁰⁰ See below for the role of special/relevant circumstances in the delimitation process.

¹⁰¹ Judge Gros’s dissenting opinion in the *Tunisia v. Libya Case*, at paras 12-3; Nelson, L., “The Roles of Equity in the Delimitation of Maritime Boundary,” 84 *AJIL* (1990), at p.839; Shaw, M., *International Law*, 3rd ed, Grotius Publications Limited, Cambridge (1991), at p.110; Brownlie, *op. cit.*, n.52, at p. 26; Lowe, *op. cit.*, n.50, at p.74.

¹⁰² See Jennings, *op. cit.*, n.73, at p.36. In addition, Sir Robert Jennings in more recent article held the view that: “If equity is not to modify the law, it can have no role to play other than to complicate and confuse the justice terminology.” See Jennings, *op. cit.*, n.16, p.404; see also pp.399-400.

¹⁰³ See Blecher, M.D., “Equitable Delimitation of Continental Shelf,” 73 *AJIL* (1979), at p.86.

¹⁰⁴ Judge Jiménez de Aréchaga’s separate opinion in the *Tunisia v. Libya Case*, at p.105, para. 21. And Judge Jiménez de Aréchaga, *op. cit.*, n.14, at p.230. Also Shabtai Rosenne, wrote that “Above all, it is necessary to stop viewing equity as something which is in opposition to the law or as supplying a corrective to the law.” See Rosenne, S., “The Position of the International Court

Secondly, equity should be looked at independently on its own merits, as an integral part of international law.¹⁰⁵ The Court in the *Tunisia v. Libya Case* indicated this role by stating that:

Equity as a legal concept is a direct emanation of the idea of justice. The Court whose task is by definition to administer justice is bound to apply it. In the course of the history of legal systems the term 'equity' has been used to define various legal concepts. It was often contrasted with the rigid rules of positive law, the severity of which had to be mitigated in order to do justice. In general, this contrast has no parallel in the development of international law; the legal concept of equity is a general principle directly applicable as law.¹⁰⁶

In practice this means that equity has an a priori role: that is, to work towards an equitable result by balancing up all the relevant circumstances of each case.¹⁰⁷

Judge Bedjaoui described the role of equity as:

les principes équitables se présentent en définitive comme un arsenal juridique dans lequel le juge puise les outils permettant d'identifier, d'évaluer, de comprendre et de satisfaire des circonstances reconnues juridiquement pertinentes dans une espèce déterminée.¹⁰⁸

The difference between the two suggestions is that equity in the first sense has a negative role; that is, to avoid a particular outcome resulting from the general rules of law. This outcome is equitable in normal cases, but in an abnormal case is inequitable. Therefore, equity would have no role to play without the general rules of law. Equity in the second sense, i.e. autonomous equity, involves the court or tribunal using equity to create principles for each case, and to derive from these principles an outcome, which would appear to the court equitable in this specific case.¹⁰⁹ Hence, autonomous equity would have a positive function—to

of Justice on the Foundations of the Principle of Equity in International Law," *Forty Years International Court of Justice: Jurisdiction, Equity and Equality*, Bloed and Van Dijk (eds.), Europa Instituut Utrecht, the Netherlands (1988), at p.108.

¹⁰⁵ Nelson, *op. cit.*, n.101, at p.841; Jiménez de Aréchaga, *op. cit.*, n.14, at p.232 and p.238; Higgins, *op. cit.*, n.54, at p.221.

¹⁰⁶ *Tunisia v. Libya Case*, at para.71. See also the Award of the Tribunal of Arbitration in the *Norwegian Claims Case* between the United States of America and the Kingdom of Norway of 1922, *The Hague Court Reports*, Second Series, James Scott (ed.), Oxford University Press, New York (1932), at p.65.

¹⁰⁷ Jiménez de Aréchaga, *op. cit.*, n.14, at p.238; Weil, *op. cit.*, n.23, at pp.172-3; Judge Weeramantry, *op. cit.*, n.24, at p.215-8, paras.10 and 20.

¹⁰⁸ "a juridical arsenal from which the judge draws the tools which enable him to identify, evaluate, understand and give effect to circumstances recognised as juridically relevant in a particular case". Judge Badjaoui in "L'énigme' des 'principes équitables' dans le droit des délimitations maritimes." at p.348. Quoted from Judge Weeramantry, *op. cit.*, n.24, at p.217, para.18.

¹⁰⁹ Higgins, *op. cit.*, n.54, at p.225. See also Lauterpacht, *op. cit.*, n.52, at pp.145-7. Interestingly, knowing the technique of the court in dealing with continental shelf delimitation may explain the

construct an equitable result—not only to avoid an inequitable result.¹¹⁰ This alleged role for equity was considered by some writers as very close to the power to decide a case *ex aequo et bono*. This, in the words of Professor Weil, was because “equity, with this approach, ends up replacing the norm and taking the place of the law. It is no use saying that equity remains a legal concept because it is the law which determines when it is to be applied. Equity thus conceived inevitably drafts from the objectivity of the reasonable and the unreasonable into the subjectivity of the just and the unjust.”¹¹¹

The position in the case law concerning the rule of equity in maritime boundary delimitation is contradictory and confused. A corrective role for equity was employed in some cases such as the *Anglo/French*,¹¹² *Dubai/Sharjah*¹¹³, *Libya v. Malta*¹¹⁴ and *Greenland v. Jan Mayen* case.¹¹⁵ In these cases ‘a two-stage process’ was employed. In the first stage a provisional equidistance line was constructed as a starting line. In the second stage this line was to be corrected where it was necessary to meet the requirement of equity. This correction or departure from the equidistance line occurred where special/relevant circumstances were present.¹¹⁶

By way of contrast, autonomous equity was invoked in others such as *Tunisia v. Libya*¹¹⁷, *Guinea/ Guinea-Bissau*¹¹⁸ and *France/Canada Award*.¹¹⁹ In these cases a court or tribunal starts the delimitation process by seeking “an equitable result based on the balance of all the relevant circumstances of each case.”¹²⁰ The method of delimitation should be justified by the equity of the result. This

various statements from the court that each case is unique and requires its own solution. See also Alexiades, P., “The Search for a Panacea for Maritime Boundary Settlement: Equity or Equidistance?” *National and International Boundaries*, vol.14, Session 1983, Thessaloniki (1985), at pp.817-26. Similarly, see Judge Weeramantry, *op. cit.*, n.24, at p.244, para.109.

¹¹⁰ Weil, *op. cit.*, n.23, at pp.165-7; Nelson, *op. cit.*, n.101, at pp.840-1.

¹¹¹ Weil, *op. cit.*, n.23, at p.167.

¹¹² Para.249.

¹¹³ Pp.672-3.

¹¹⁴ Paras.61-2.

¹¹⁵ Paras.51 and 53.

¹¹⁶ Jiménez de Aréchaga, *op. cit.*, n.14, at p.230; Thirlway, *op. cit.*, n.94, at pp.43-4.

¹¹⁷ Paras.72, 110, 111 and 139.

¹¹⁸ Paras.89 and 102.

¹¹⁹ Paras.62, 65, 69 and 70. See also Professor Weil’s dissenting opinion in the Award, at para.28.

¹²⁰ Jiménez de Aréchaga, *op. cit.*, n.14, at p.238.

because the result “is predominate; the principles are subordinate to the goal.”¹²¹ These different positions may demonstrate the difficulty and inconsistency in the case law concerning the role of equity in maritime boundary delimitation.¹²²

Controlling equity

In using the concept of equity and equitable principles to justify a boundary line an important question arises over the need to control the third-party settlement in its use of the concept of equity.¹²³ Judge Gros in his dissenting opinion in the *Gulf of Maine Case* stated that:

Controlled equity as a procedure for applying the law would contribute to the proper functioning of international justice; equity left, without any element of control, to the wisdom of the judge reminds us that equity was once measured by ‘the Chancellor’s foot’; I doubt that international justice can long survive an equity measured by the judge’s eye. When equity is simply a reflection of the judge’s perception, the courts which judge in this way part company from those which apply the law.¹²⁴

It is easy to say that we need to control and monitor the use of equity by the third-party settlement, but it is difficult to decide how such control could be carried out in practice.¹²⁵ Moreover, controlling equity might not be desirable, since it may reduce the flexibility of equity.¹²⁶ This flexibility is in fact the real reason behind the adoption of equity in shelf delimitation. The ICJ or an *ad hoc* arbitration tribunal can with this flexibility cover unexplained processes used in choosing the boundary line.¹²⁷

¹²¹ *Tunisia v. Libya Case*, at para. 70.

¹²² See Janis, M.W., “Equity in International Law,” 7 *EPIL* (1989) at p.78.

¹²³ For further discussion on the dangers of applying equity, see Akehurst, *op. cit.*, n.56, at pp.808-12.

¹²⁴ See Judge Gros, *op. cit.*, n.24, at p.386, para. 41. Similarly, Judge Jiménez de Aréchaga held that: a court having the “authority to apply equitable principles does not entitle [it]...to reach a capricious decision in each particular case, but to reach that decision which, in the light of the individual circumstances, is just and fair for that case.” Judge Jiménez de Aréchaga, *op. cit.*, n.14, at p.232.

¹²⁵ See here the observation of Lowe: *op. cit.*, n.50, at p.75 and p.78.

¹²⁶ Judge Weeramantry in a separate opinion in the *Greenland v. Jan Mayen Case* wrote this about the flexibility of equity. He said: “In the context of maritime delimitation, each case presents upon the facts a different shape from every other, and equity adjusts itself around that shape in the manner described because it is flexible, where a rigid rule would scarcely do it justice.” Weeramantry, *op. cit.*, n.24, at p.250, para.135.

¹²⁷ Jennings, *op. cit.*, n.73, at p.31. See also Judge Weeramantry, *op. cit.*, n.24, at p.244, para.109.

(4) The notion of natural prolongation

This is the fourth rule that the Court in the *North Sea Cases* identified as governing continental shelf delimitation. It asserted that the continental shelf of a state should not encroach upon the natural prolongation¹²⁸ of any other state.¹²⁹ This would require that the delimitation avoid any cut-off effect from the prolongation of any party.¹³⁰ In the *France/Canada Award*, Canada invoked the principle of non-encroachment in order to exclude the application of the equidistance line between the French islands of St. Pierre and Miquelon and the Canadian coastline of Newfoundland.¹³¹ This was, Canada alleged, because the application of the equidistance method in this case would result in an encroachment upon Canada's natural prolongation. This would end in the cutting off an area that appertains to Canada's natural prolongation, and attributing it thereby to France. Such an outcome should be avoided, because the delimitation "must not encroach upon what is the natural prolongation of the territory of another State."¹³² In the delimitation the Court divided the area¹³³ concerned into two sectors: (1) The first sector, called the western seaward projection, was where the coasts of St. Pierre and Miquelon islands face the Cabot Strait. The presence of the French Islands close to the Newfoundland coast caused the Court, and the parties as well, to recognize that some degree of encroachment was sometimes unavoidable.¹³⁴ This inescapable encroachment was to allocate for the French Islands a 12-nautical-mile EEZ that was measured from the outer limit of their territorial sea.¹³⁵ (2) "In the second sector, towards the south and the Southeast

¹²⁸ In fact, as we have seen in Chapter One, this was not the first time that the concept of natural prolongation entered into the vocabulary of continental shelf doctrine.

¹²⁹ *North Sea Cases*, at para. 101(C)(1). Sir Robert Jennings in a recent article criticized the court for inventing of the notion of natural prolongation as a fundamental concept of the law of continental shelf delimitation; see Jennings, *op. cit.*, n.16, at pp.403-8.

¹³⁰ *North Sea Cases*, at para.101(C)(1); *France/Canada Award*, at para.58.

¹³¹ *France/Canada Award*, at para.58.

¹³² *North Sea Cases*, at para.85(C).

¹³³ "The continental shelf in the area [was] agreed to be a geological continuum," and to extend beyond 200 nautical miles from the coasts. See *France/Canada Award*, at para.23.

¹³⁴ *France/Canada Award*, at para.67, see also Professor Weil's dissenting opinion in this Award, at para.17.

¹³⁵ *France/Canada Award*, at para.69.

[the Court found] the geographical situation is completely different.”¹³⁶ Its treatment of the principle of non-encroachment was also different. The Court, as noted, recognized that an element of encroachment was unavoidable in the western sector, but in the second sector it asserted that such an element should not be allowed to occur.¹³⁷ This was why it invoked the theory of coasts projecting frontally.¹³⁸ “According to this theory, coasts project solely in the direction which they face,...and that projection is effected for a breadth corresponding to the breadth of the coastal front.”¹³⁹ The Islands have a coastline breadth of 10.5 nautical miles. Consequently, the Court allocated to St.Pierre and Miquelon a corridor of 10.5 nautical miles in width and 200 nautical miles in length.¹⁴⁰ This decision was criticized by Professor Weil in his dissenting opinion.¹⁴¹

Again, subjectivity and inconsistency are manifested in third-party engagement in the delimitation of the maritime boundary. This inconsistency prevented the detection of any clear guideline regarding the principle of non-encroachment, and as to when an element of encroachment is allowable and when is it not. The position of the Tribunal in this Award may throw some doubt upon the usefulness of using the concept of natural prolongation, or its negative expression, i.e. the principle of non-encroachment, in the process of delimitation.

¹³⁶ Ibid., at para.70.

¹³⁷ Ibid.

¹³⁸ Both “in respect of the sea-bed and of the water column.” Ibid., at para.58.

¹³⁹ Professor Weil’s dissenting opinion in this Award, at pp.1199-200, para.9; see also his criticism to the theory of coasts project frontally, at p.1200, para. 11 of his dissenting opinion.

¹⁴⁰ *France/Canada Award*, at para.71.

¹⁴¹ Para.29, see also paras.9-28; Evans, M., “Delimitation and the Common Maritime Boundary,” 64 *BYBIL* (1993), at pp.320-3.

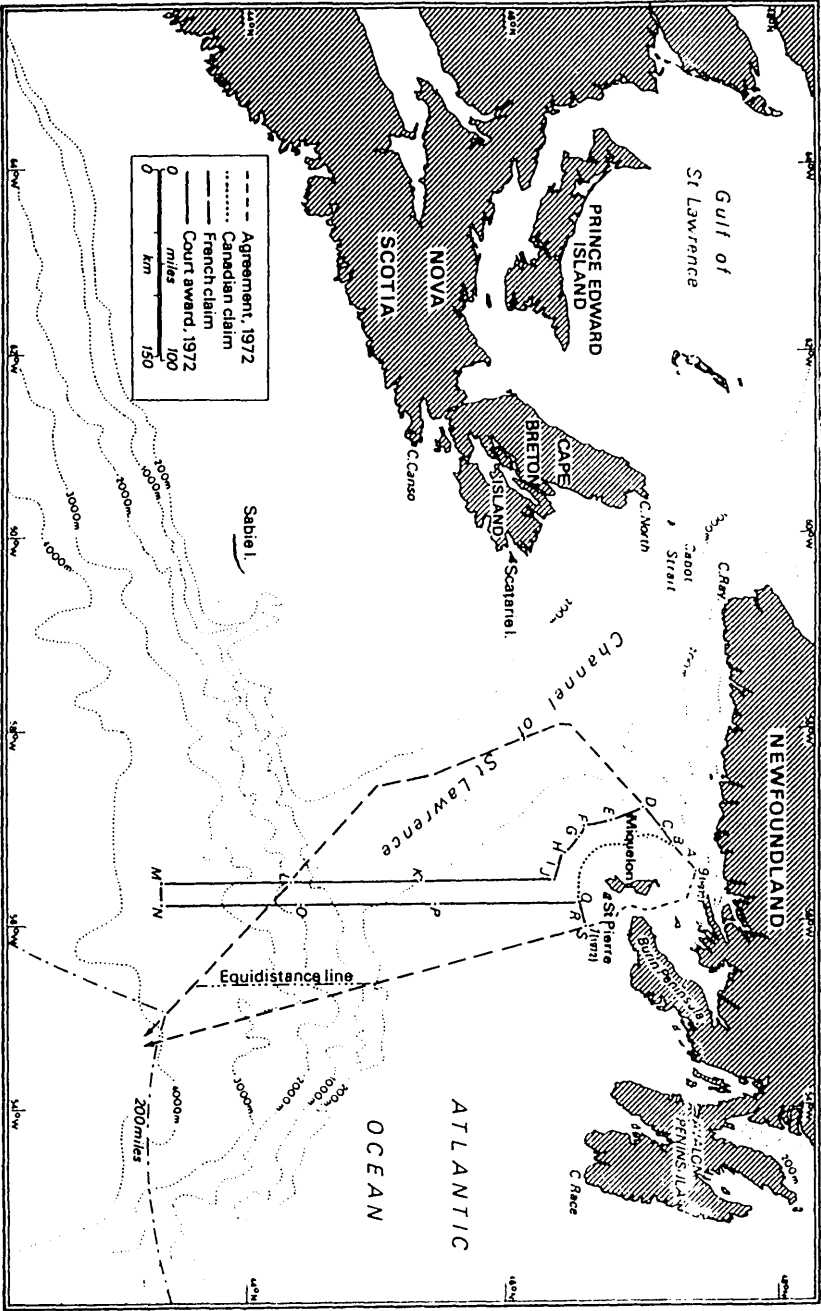


Figure: (6) St Pierre-Miquelon Award.
Source: 95 *ILR*, at p.725.

Furthermore, in many cases the continental shelf in the area will constitute the natural prolongation of the land territory of both parties to the delimitation. For example in the *Dubai/Sharjah Award*, the Court of Arbitration noted that the “seabed bounded by Dubai, Sharjah’s mainland, and Abu Musa [island] is shallow...and there is no clear geomorphic or geologic delineation of the land territories of either Dubai or Sharjah. None of this seabed is indisputably solely the natural prolongation of either State.”¹⁴²

The fact that the continental shelf is a natural prolongation for both parties, may prevent the notion from becoming the basis for a satisfactory solution in many cases concerning continental shelf delimitation.¹⁴³ The Tribunal in the *Guinea/Guinea-Bissau Award* made this fact particularly clearly in a statement worth quoting:

the rule of natural prolongation can be effectively invoked for purposes of delimitation only where there is a separation of continental shelves.¹⁴⁴

Finally, the adoption of a distance criterion in the 1982 Convention, to the effect that a coastal state has jurisdiction over the continental shelf up to 200 nautical miles from its baselines, has deprived the notion of natural prolongation of usefulness in the matter of continental shelf delimitation within such a distance from the coast.¹⁴⁵

A specific method for continental shelf delimitation in customary law

The position of customary law in the case of delimitation between adjacent states as it is seen in the judgement of the World Court in the *North Sea Cases* is that:

¹⁴² *Dubai/Sharjah Award*, at p. 667.

¹⁴³ The Court in the *Tunisia v. Libya Case*, for example, held that: “The principle that the natural prolongation of the coastal State is a basis of its legal title to continental shelf rights does not in the present case...necessarily provide criteria applicable to the delimitation of the areas appertaining to adjacent States.” See *Tunisia v. Libya Case*, at para.48.

¹⁴⁴ *Guinea/Guinea-Bissau Award*, at para.116.

¹⁴⁵ The court in the *Libya v. Malta Case* upheld this line of thinking; see para.39 of the Court’s judgement. See also *Oppenheim’s, op. cit.*, n.52, at pp.781-2; Jennings, *op. cit.*, n.16, at pp.406-7. For further discussion on the notion of natural prolongation as a legal basis of title to continental shelf, see Chapter One/Section Three.

the use of the equidistance method of delimitation [is] not...obligatory as between the Parties, and there [is]...no other single method of delimitation the use of which is in all circumstances obligatory.¹⁴⁶

The Court, on the one hand, rejected any mandatory status or priority for the principle of equidistance. So the starting point of the delimitation in customary law might not necessarily be the principle of equidistance.¹⁴⁷ On the other hand, it asserted that there is no single method which it is obligatory. Accordingly, the court should feel free to select any method, including the equidistance method, in so far as it would lead to the desired goal of an equitable result in the delimitation.¹⁴⁸ For example in the *Dubai/Sharjah Award*, both parties were, in fact, members of a federal state: The United Arab Emirates.¹⁴⁹ The Court of Arbitration applied the formula of Article 6(2) in determining the continental shelf between the coasts of the two adjacent Emirates, despite the fact that the UAE had not become party to the 1958 Convention, so that it was customary law which was applicable.¹⁵⁰ This was not because the Court acknowledged the obligatory nature of the equidistance method in customary law. Rather was it because it was “satisfied that [the] use of the equidistance method is generally appropriate to, and required in, the present case and that the delimitation of the maritime boundary between the Parties beyond their respective territorial seas should properly be based upon this method.”¹⁵¹

Having analysed the rules of customary law regarding the delimitation of the continental shelf between adjacent states, we now turn to the position of customary law regarding delimitation between opposite states. This is less controversial. The Court in the *North Sea Cases* held that less “difficulty was felt over that of the median line boundary between opposite States,...The continental

¹⁴⁶ The *North Sea Cases*, at para.101(A&B), see also para.85. To the same effect, see *Tunisia v. Libya Case*, at para.110; *Guinea/Guinea-Bissau Award*, at para.102.

¹⁴⁷ See above for the position under Article 6.

¹⁴⁸ *North Sea Cases*, at para.92; *Tunisia v. Libya Case*, at para.70; *Libya v. Malta Case*, at para.20; Judge Jiménez de Aréchaga’s separate opinion in *Tunisia v. Libya Case*, at pp.106-8, paras.27-31.

¹⁴⁹ For more analysis of the *Dubai/Sharjah Award*, see Chapter Four.

¹⁵⁰ *Dubai/Sharjah Award*, at p.654.

¹⁵¹ *Ibid.*, at pp.672-3. Interestingly, due to the fact that the 1981 *Dubai/Sharjah Award* was unpublished until late 1993 it was free, therefore, from any comment from subsequent international decisions. For illustrative map, see Chapter Four.

shelf area off, and dividing, opposite States...can...only be delimited by means of a median line.”¹⁵² Indeed the ICJ, in the *Greenland v. Jan Mayen* maritime boundary delimitation Case, 1993, where both parties (Denmark and Norway) were parties to the 1958 Continental Shelf Convention, stated that:

in the case of opposite coasts...the tendency of customary law, like the terms of Article 6, has been to postulate the median line as leading *prima facie* to an equitable result.¹⁵³

Single rule for the delimitation

It was submitted by the Court of Arbitration, in the *Anglo/French Award*, that Article 6 should be regarded as having created a combined “equidistance-special circumstances rule.” This is to say, that states would only be under a treaty obligation to apply the median line or the equidistance principle, if no other line was justified by special circumstances.¹⁵⁴ This rule, the Court concludes, is indistinguishable from the single rule of “equitable-relevant circumstances” under customary law, because they both seek an equitable result for the delimitation.¹⁵⁵ Hence, the differences between them “reflect differences of approach and terminology rather than of substance.”¹⁵⁶ Furthermore, the Court in minimizing the difference between Article 6 and customary law went on to hold that:

¹⁵² *North Sea Cases*, at para.57. Moreover, the court emphasized that the presence of islets, rocks, and minor coastal projections should be ignored in the process of delimitation, whereas the presence of islands, geological factors or general uneven configuration in the coast, should be taken into account and the median line should be modified, where it was necessary to produce an equitable result.

¹⁵³ *Greenland v. Jan Mayen Case*, at para.56.

¹⁵⁴ *Anglo/French Arbitration*, at paras.70 and 75; To the same effect, see *Greenland v. Jan Mayen Case*, at para.46. Similarly, the ICJ in the *Libya v. Malta Case* stressed the role of the circumstances of the area as a qualifying role for using the median line; see para.77.

¹⁵⁵ *Anglo/French Arbitration*, at para.148. In this Award the median line was not applicable, under Article 6, against France in the Channel Islands region by virtue of its reservation on the date when it acceded to the Convention. French reservation was, *inter alia*, to prevent the application of the equidistance principle against France in some areas where there were special circumstances within the meaning of Article 6. The Channel Islands region was among these areas. Therefore the equidistance-special circumstances rule in Article 6 is not applicable between the two parties in respect to the Channel Islands. (para. 75). However, by equating the formula of Article 6 with the rules of customary law, the Court was allowed to apply the equidistance-special circumstances rule between the two parties in the Channel Islands region, not as a rule of Article 6, but as a rule of customary law; see para.33 of the Award. See also Brown, *op. cit.*, n.4, at p.91.

¹⁵⁶ *Anglo/French Arbitration*, at para.148. The position of the Court of Arbitration was acknowledged by the ICJ in the *Greenland v. Jan Mayen Case*, see para. 56 of the judgement.

the rules of customary law are a relevant and even essential means both for interpreting and completing the provisions of Article 6. [This is because] the provisions of Article 6 do not define the condition for the application of the equidistance-special circumstances rule.¹⁵⁷

The result is that the equidistance method in Article 6 has, as in customary law, no special place in the delimitation.¹⁵⁸ It can be applied, where it is appropriate to the area concerned, but there is no obligation on the court or tribunal to do so. Indeed, the World Court in the *Libya v. Malta Case* stressed that it “is unable to accept that, even as a preliminary and provisional step towards the drawing of a delimitation line, the equidistance method is one which must be used...”¹⁵⁹ Such a view found sympathy in the *Greenland v. Jan Mayen Case* where the formula of Article 6 was applied for first time by the World Court. The Court in this case did not make a clear pronouncement on the compulsory status of the equidistance method. Rather it repeated in several paragraphs of the judgement that “it is appropriate to begin”, and “it is in accord with precedents to begin”¹⁶⁰ rather than that it is obligatory to begin with the median line. The Court in this regard followed the path taken in previous decisions concerning maritime boundary delimitation.

This finding, however, is arguably contrary to the ordinary meaning of the words of Article 6.¹⁶¹ A number of writers have expressed their disappointment at the court’s dictum. Professor Weil for example wrote that:

Instead of relying, as one would have expected, on the treaty provisions for the definition of the customary regime, the 1977 award followed the opposite course. It used the customary regime it was defining to take the heart out of the treaty regime and force it into the confines of the customary regime.¹⁶²

In a similar manner Churchill has criticized the court’s position and stated that it is unwarranted and undesirable to equate Article 6 with customary law. This is so in his view, first because the concept of relevant circumstance in customary law is unlimited. Secondly, “the equation of Article 6 with customary

¹⁵⁷ *Anglo/French Arbitration*, at para.75. See also Gilmore, W., “Sea and Continental Shelf,” 21 *The Laws of Scotland* (1994), at p. 24, para.28; Weil, *op. cit.*, n.23, at p.149.

¹⁵⁸ *Tunisia v. Libya Case*, at para.110.

¹⁵⁹ *Libya v. Malta Case*, at para.43.

¹⁶⁰ See for example paras.49 and 51 of the judgement.

¹⁶¹ Judge Shahabuddeen, *op. cit.*, n.12, at p.144.

¹⁶² Weil, *op. cit.*, n.23, at p.147.

law is undesirable because Article 6 offers a reasonably precise rule, whereas...customary law is characterised by its generality and lack of precision.”¹⁶³

Delimitation of the continental shelf and EEZ in the 1982 Convention

The 1982 Convention provides three main elements in addressing the problem of the continental shelf boundary delimitation. Firstly, it supplies a new formula for the delimitation. Secondly, it introduces procedures for the settlement of the dispute where agreement cannot be reached in a reasonable period of time.¹⁶⁴ Thirdly, it provides provisional arrangements during the transition period.¹⁶⁵ However, because of limitations of time and space and because the UAE is not a party to the Convention we will focus our attention only on the delimitation criteria.

Article 83(1) of the 1982 Convention provides that: “The delimitation of the continental shelf between States with opposite or adjacent coasts shall be effected

¹⁶³ Churchill, R.R., “The Greenland-Jan Mayen Case and its Significance for the International Law of Maritime Boundary Delimitation,” 9 *IJMC* (1994—1), at p.15. Furthermore, Churchill, in supporting his argument referred to the statement of the Chamber in the *Gulf of Maine Case* that “customary international law merely contains a general requirement of the application of equitable criteria and the utilisation of practical methods capable of implementing them. It is therefore special international law that must be looked to, in order to ascertain whether that law...does or does not include some rule specifically requiring the Parties, and consequently the Chamber, to apply certain criteria or certain specific practical methods to the delimitation that is requested.” See *Gulf of Maine Case*, at para.114, see also para.81.

¹⁶⁴ Article 83(2) reads: “If no agreement can be reached within a reasonable period of time, the States concerned shall resort to the procedures provided for in Part XV.” See also Brown, *op. cit.*, n.4, at pp.74-5. For the effectiveness of the system for dispute settlement in 1982 Convention on maritime boundary dispute, see below at pp.265-6.

¹⁶⁵ Article 83(3) reads: “Pending agreement as provided for in paragraph 1, the States concerned, in a spirit of understanding and co-operation, shall make every effort to enter into provisional arrangements of a practical nature and, during this transitional period, not to jeopardise or hamper the reaching of the final agreement. Such arrangements shall be without prejudice to the final delimitation.”

Accordingly, states, before reaching a final agreement in the boundary question are encouraged to enter into “provisional arrangements of a practical nature.” Such arrangements can be found in state practices. The Japan/South Korea agreement of 1974 is an example of the establishment of a joint development zone for fifty years at least. Article 31(2) of the Japan-Korea agreement of 1974 concerning joint development zone. For the text of the agreement, see *International Maritime Boundaries*, Charney and Alexander (eds.), Martinus Nijhoff Publishers, the Netherlands (1993), at p.1086. See also *United Nations Convention on the Law of the Sea 1982: A commentary*, vol. II, Nandan S. and Rosenne S. (eds.), Centre for Oceans Law and Policy, Martinus Nijhoff Publishers, the Netherlands (1993), at p.984.

by agreements on the basis of international law, as referred to in Article 38 of the statute of the International Court of Justice, in order to achieve an equitable solution.” *Mutatis mutandis*, the provisions are the same, under Articles 74(1), for the delimitation of the EEZ boundary.

Interpretation of the delimitation criteria in Articles 74(1) and 83(1)

The obligation to negotiate an agreement, as enunciated in Article 6 and stressed in the decision of the ICJ in the *North Sea Cases*, has been repeated in Articles 74(1) and 83(1). The difference, however, is that under Article 6 this obligation is not linked to any specific criteria, whereas it is linked to the equitable principles in the decision of the ICJ.¹⁶⁶ Under the new formula this duty should be exercised on the basis of the rules governing delimitation, which “would be determined by reference to the generally recognised sources and forms of evidence of international law laid down in Article 38.”¹⁶⁷ The result is that the parties are not “free to reach an agreement on the basis of whatever considerations they please.”¹⁶⁸ The object of the negotiation of a boundary agreement on these bases, according to the Articles, is to reach an equitable result for the delimitation. In this regard, the new formula for the delimitation “does not furnish any practical assistance towards [that] solution.”¹⁶⁹

Not unexpectedly, the formula of continental shelf and EEZ delimitation in the 1982 Convention has been the subject of strong criticism among international jurists. Judge Gros, for example, in his dissenting opinion in the *Gulf of Maine Case*, expressed his hostility toward it. He described it as an empty formula, and pointed out that it was difficult to extract any practical rules from it. Moreover, the effect of these two Articles had been to distort the legal edifice of the 1958

¹⁶⁶ See above at p.93, and p.99.

¹⁶⁷ Brown, *op. cit.*, n.4, p.344. See also the observation of Degan on this formula; Degan, *op. cit.*, n.64, at p.127.

¹⁶⁸ Brown, *op. cit.*, n.4, at p.343.

¹⁶⁹ Judge Oda, *op. cit.*, n.12, at p.246, para.144. See also the judgement in the *Tunisia v. Libya Case*, at para. 49, and see Oda, S., “Dispute Settlement Prospects in the Law of the Sea,” 44 *ICLQ* (1995), at p.869. Similarly, see Degan, *op. cit.*, n.64, at p.134; *Oppenheim’s, op. cit.*, n.52, at pp.780-1.

Convention, the 1969 Judgement and the 1977 Decision.¹⁷⁰ The US delegation to the Third UN Conference on the Law of the Sea expressed its reaction to the new formula by stating that it “might have the effect of adding confusion to the law.”¹⁷¹ The adoption of this empty formula can hardly be understood without examination of the negotiating history.¹⁷² To this we shall now turn.

The history of Articles 74(1) and 83(1) of the 1982 Convention

Interestingly enough, the formula detailed in Articles 74(1) and 83(1) reveals almost nothing from the negotiations at the Third United Nations Conference on the Law of the Sea. This is because the said Articles were drafted at the last minute by the President of UNCLOS III, Ambassador Tommy Koh of Singapore, after the failure of negotiations at the Conference.¹⁷³ The precise reason for this last-minute draft was to secure a consensus for the two Articles and to avoid any obstacle which might have jeopardized the acceptance of the Convention as a whole. Reservation to the Convention, it must be noted, was not to be permitted.¹⁷⁴ Thus, it was necessary to formulate an elastic or flexible formula for a delicate and controversial matter such as the delimitation of the continental shelf and EEZ boundaries. Indeed, Judge Oda in his dissenting opinion in the *Tunisia/ Libya Case* described the formula of Articles 74(1) and 83(1) as a formula which forms a catchall provision “that would be satisfactory to delegates with not only different but sometimes contradictory views on the delimitation of the continental shelf and of the exclusive economic zone.”¹⁷⁵

At UNCLOS III there were various proposals submitted from a number of states who participated in the Conference. Not surprisingly, each proposal reflected the interests of the state or states which submitted it. Each one thus reflected a desire to adopt a rule which would strengthen its legal position in any

¹⁷⁰ See Judge Gros, *op. cit.*, n.24, at p.365, para.8; see also p.382, para.37.

¹⁷¹ See Brown, *op. cit.*, n.12, at p.33.

¹⁷² For the influence of this formula on one of the UAE boundary agreements, see below at p.197.

¹⁷³ Brown, *op. cit.*, n.4, at p.33.

¹⁷⁴ Articles 309 and 310 of the 1982 Convention.

¹⁷⁵ See Judge Oda, *op. cit.*, n.12, at p.246, para.143.

possible future delimitation with neighbouring states.¹⁷⁶ Kenya, Tunisia, France¹⁷⁷ and Romania, for example, suggested that delimitation should be effected by agreement in accordance with equitable principles and take account of all relevant/special circumstances which may be present in the area of delimitation. The median line or equidistance line, therefore, would not be the only method for the delimitation. Turkey¹⁷⁸ and the Netherlands¹⁷⁹ supported a similar proposal, without making any reference to particular methods. By way of contrast, Australia and Norway submitted a joint proposal in which they repeated the formula of Article 6 of the 1958 Convention.¹⁸⁰ Japan asserted that the delimitation of the continental shelf and EEZ “shall be effected by agreement taking into account the principle of equidistance.”¹⁸¹ China suggested that states should determine their continental shelf and EEZ boundary “through consultations on an equal footing...[and] on the basis of safeguarding and respecting the sovereignty of each other.”¹⁸² In the negotiating groups which were set up during the seventh session in 1978, two schools of thought emerged: the median line school and the equitable principle school.¹⁸³

On May 17, 1978 Mr. E.J. Manner, the Chairman of the negotiating group, stated in his report that:

Like before, the positions of the delegations differed markedly between those in support of the equidistance solution and those favouring delimitation in accordance with equitable principles..

¹⁷⁶ Moreover, if a state had “a poor case by reference to the Geneva formula, it was better to support the new formula” See Brown, *op. cit.*, n.4, at p.333.

¹⁷⁷ *UNCLOS III Official Records*, vol. 3, at pp.215 and 237.

¹⁷⁸ *Ibid.*, at p.190.

¹⁷⁹ *Ibid.*, at p.213.

¹⁸⁰ Judge Oda, *op. cit.*, n.12, at p.234, para.131.

¹⁸¹ *UNCLOS III Official Records*, vol. 3, at p.211.

¹⁸² Quoted from Judge Oda, *op. cit.*, n.12, at para.131. The UAE position was to support the median line school; see also Chapter Five below.

¹⁸³ The median line school suggested that: “The delimitation of the Exclusive Economic Zone/Continental Shelf between adjacent or opposite States shall be effected by agreement employing, as a general principle, the median line or equidistance line, taking into account any special circumstances where this is justified.”

Whereas the equitable principle school suggested that: “The delimitation of the Exclusive Economic Zone (or Continental Shelf) between adjacent or/and opposite States shall be effected by agreement, in accordance with equitable principles taking into account all relevant circumstances and employing any methods, where appropriate, to lead to an equitable solution.” Quoted from Judge Oda, *op. cit.*, n.12, at p.238, para.135. For further details on the various proposal before the Conference, see *United Nations Convention, op. cit.*, n.165, at pp.954-67.

[So] no approach or formulation [has] received...widespread and substantial support that would offer a substantially improved prospect of a consensus in the plenary.¹⁸⁴

The Chairman repeated his evaluation of the situation at the Conference in his various reports dated September 14, 1978, April 24, 1979, and August 22, 1979.¹⁸⁵ At the ninth session the Chairman suggested a neutral formula in order to secure a consensus. It was worded as follows:

The delimitation of the exclusive economic zone/continental shelf between States with opposite or adjacent coasts shall be effected by agreement in conformity with international law. Such an agreement shall be in accordance with equitable principles, employing the median or equidistance line, where appropriate, and taking account of all circumstances prevailing in the areas concerned.¹⁸⁶

This formula was incorporated in the Informal Composite Negotiating Text/Revision 2.¹⁸⁷ The Chairman stated at the general committee meeting on August 28, 1980 that, "the two main interest groups had shown a genuine willingness to arrive at a mutually acceptable compromised text."¹⁸⁸ However, some countries had stressed the importance in giving states time to examine the President's proposal. Thereafter, Ambassador Tommy Koh, the President of the Conference, undertook direct negotiation with the representative of the equitable principles school and the representative of the median line school, and with the assistance of the Fijian Ambassador. On the basis of the negotiation the President revised the delimitation formula that was adopted at the ninth session. The new text for Articles 74(1) and 83(1) was finally adopted into the draft Convention on August 28, 1981, the very last day of the tenth session, worded as follows:

1. The delimitation of the exclusive economic zone/the continental shelf between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution.¹⁸⁹

¹⁸⁴ *UNCLOS III Official Records*, vol. 10, at p.124.

¹⁸⁵ *Ibid.*, vol. 10, at p.171; and vol. 11, at p.59, para.27; and vol. 12, at p.107 and p.109.

¹⁸⁶ *Ibid.*, vol. 13, at p.77. See also *United Nations Convention*, *op. cit.*, n.165, at p.976.

¹⁸⁷ *United Nations Convention*, *op. cit.*, n.165, at p. 978. The delegate of Ireland, the leader of the equitable principle group, deposited a letter dated May 30, 1980, signed by the countries sponsoring the equitable principles formula to the President of the UNCLOS III, stating that: "The new formulations as they appear in Articles 74(1) and 83(1) of the Informal Composite Negotiating Text/Revision 2 'did not emerge from negotiations themselves' nor did those formulations receive the widespread and substantial support' required in plenary to offer a substantially improved prospect of consensus." See Judge Oda, *op. cit.*, n.12, at pp.244-5, paras.141-2. See also *United Nations Convention*, *op. cit.*, n.165, at p.979.

¹⁸⁸ Judge Oda, *op. cit.*, n.12, at pp.244-5, para.141.

¹⁸⁹ *Ibid.*, at p.246, para.142.

However, as Professor Brown has remarked, the cost of this adoption was high. The result “was to burden the international community with a formula which is virtually meaningless in itself and very difficult to interpret even when the reference to ‘international law’ is followed up.”¹⁹⁰

A single maritime boundary

As was mentioned in Chapter One, the emergence of the EEZ into international law raises several issues regarding the relationship between the EEZ and the continental shelf up to 200 nautical miles from the baselines. Among these issues is the question of whether the EEZ and the continental shelf may have different boundary lines, or whether they should have one single line.¹⁹¹ This argument resulted from two factors:

- (1) An identical formula, as we have seen, had been adopted in the 1982 Convention for the delimitation of the two areas.¹⁹²
- (2) If the boundary lines of the two zones are not necessarily coincident, there could be cases where the sea-bed and subsoil of an area fell within the jurisdiction of one state, while the water-column was under the jurisdiction of another.¹⁹³

Practicality makes the adoption of a single boundary line desirable. Nonetheless, international law has provided no rules for using such a line. We shall trace the question of a single line in state practice and in case law. This is in order to identify where the doctrine of a single line stands in this practice.

¹⁹⁰ Brown, *op. cit.*, n.4, at p.48.

¹⁹¹ *Oppenheim's, op. cit.*, n.52, at p.805.

¹⁹² However, Oda in this regard wrote: “In spite of the practical identity between Article 74 and Article 83, there is, of course, no guarantee that the delimitation of the EEZ and the delimitation of the continental shelf will necessarily be identical.” See Oda, S., “The International Court of Justice Viewed from the Bench,” 244 *Académie De Droit International* (1993-VII), at p.139. A similar view was held by Professor Weil, *op. cit.*, n.23, at p.132; O’Connell, *op. cit.*, n.19, at p.728.

¹⁹³ Judge Oda, *op. cit.*, n.12, at pp.231-3, paras.126-8. See also Churchill, R.R., “Maritime delimitation in the Jan Mayen Area,” 9 *Marine Police* (1985), at p.28; O’Connell, *op. cit.*, n.19, at p.729; *Oppenheim's, op. cit.*, n.52, at p.805. For some useful comments on the case of vertical superimposition of rights, see Weil, *op. cit.*, n.23, at p.133.

State practice

Since 1975, when the doctrine of the EEZ began to receive significant support in the international community,¹⁹⁴ state practice in majority cases was to prefer one single boundary for all purposes of maritime jurisdictions.¹⁹⁵ The Dominican Republic-Venezuela maritime boundary agreement of 1979 may be cited as an example of establishing one single maritime boundary between two countries.¹⁹⁶ This line is illustrated in a map reproduced below.

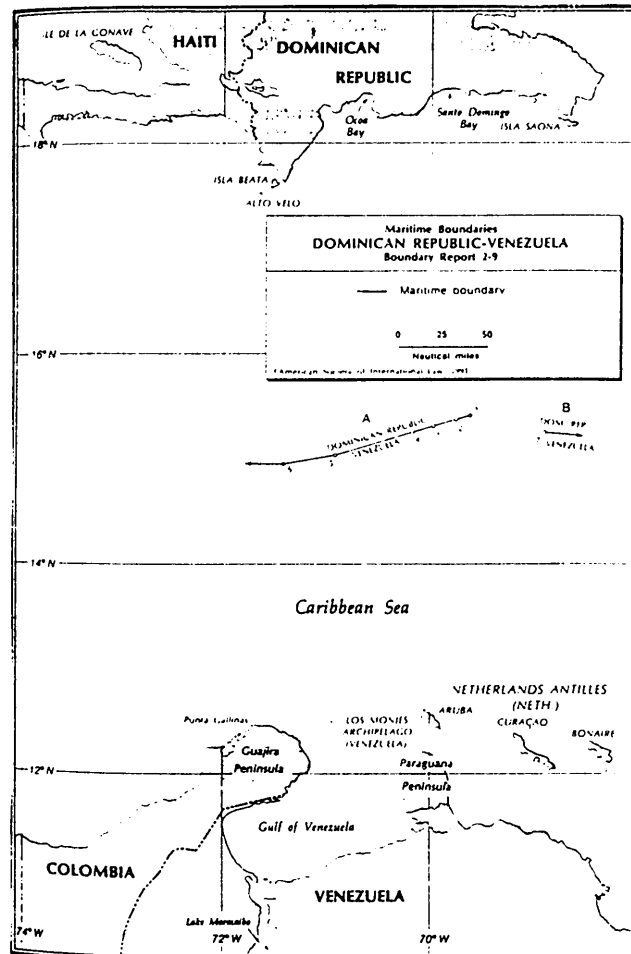


Figure: (7) Dominican-Venezuela maritime boundaries
Source: *International Maritime Boundaries*, at p.587.

¹⁹⁴ For more dissection on the doctrine of EEZ, see Chapter One.

¹⁹⁵ Charney, *op. cit.*, n.41, at p.246.

¹⁹⁶ See Article One of the agreement in Charney and Alexander, *op. cit.*, n.165, at p.588. In addition to this agreement, there were a number of boundary agreements where the parties adopted a single line for the shelf and EEZ boundaries, such as: Cuba-US agreement of 1977; Mexico-US agreement of 1978; USSR-US agreement of 1990; Colombia-Costa Rica agreement of 1977; Colombia-Dominican agreement of 1977; Trinidad and Tobago-Venezuela agreement of 1990.

Furthermore, there were at least four cases where the boundary of an EEZ (or EFZ) has been accepted as corresponding to the boundary of the continental shelf. The first case is the Finland-USSR agreement of 1985. The parties agreed to replace the boundary lines between their continental shelves and their fishery zones; these had been defined on in 1965, 1967 and 1980 respectively, with one single boundary line for all purposes of maritime zones.¹⁹⁷ The second example is the 1987 Turkish-USSR exchange of notes. The two parties agreed to regard the continental shelf boundary line, agreed upon in 1978, as the boundary line between their EEZs.¹⁹⁸ The third case is the announcement of the Iranian delegate at UNCLOS III that “the limits of the exclusive fishery zone corresponded to the outer limit of the continental shelf.”¹⁹⁹ The final instance is the assertion of the UAE in 1981 that the boundary of the EEZ should be “determined in accordance with the provisions of the agreements concluded by the Emirates members of the Union in connection with their continental shelf.”²⁰⁰

However, this growing tendency of adopting a single boundary line has not been followed by some states. Spain, for instance, rejected the French offer to use the continental shelf boundary line in the Bay of Biscay agreed upon in 1974 as the boundary line between their EEZs.²⁰¹ Spain insisted instead on adopting a different line.²⁰² A clear example of using separate lines for each zone can be found in the Australia-Papua New Guinea agreement in Torres Strait.²⁰³ The two parties agreed on a line for the shelf boundary and another for the fishing zones boundary.²⁰⁴ Another example is the Australia-Indonesia fisheries agreement of

¹⁹⁷ Charney and Alexander, *op. cit.*, n.165, at p.1995.

¹⁹⁸ *Ibid.*, at p.1706.

¹⁹⁹ See *UNCLOS III Official Records*, vol. I, at p.72, para.22, and the 1973 Iranian EFZ Proclamation.

²⁰⁰ Article 3 of the UAE Ministry of Foreign Affairs Declaration Concerning the EEZ and its Delimitation of 25 August, 1980, reprinted in *The Law of the Sea, National Claims to Maritime Jurisdiction*, UN Office for Ocean Affairs and the Law of the Sea, New York (1992), Article 3, at p.135. For further discussion on the Iranian and the UAE marine laws, see Chapter Five.

²⁰¹ For the text of the agreement, see Charney and Alexander, *op. cit.*, n.165, at p.1727, Article 6 in particular.

²⁰² Weil, *op. cit.*, n.23, at pp.118-9.

²⁰³ Additional example is the Malaysia-Thailand continental shelf agreement of 1979.

²⁰⁴ For the text of the agreement, see Charney and Alexander, *op. cit.*, n.165, at pp.937-75. For a comment on the agreement, see Burmester, “The Torres Strait Treaty: Ocean Boundary Delimitation by Agreement,” 76 *AJIL* (1982), at pp.321-49. In addition, the agent of Libya in his

1981. The two parties agreed upon a boundary line between their fishing zones different from the shelf boundary line, which they had agreed upon in 1972.²⁰⁵ The Australian-Indonesian boundary lines are illustrated below.

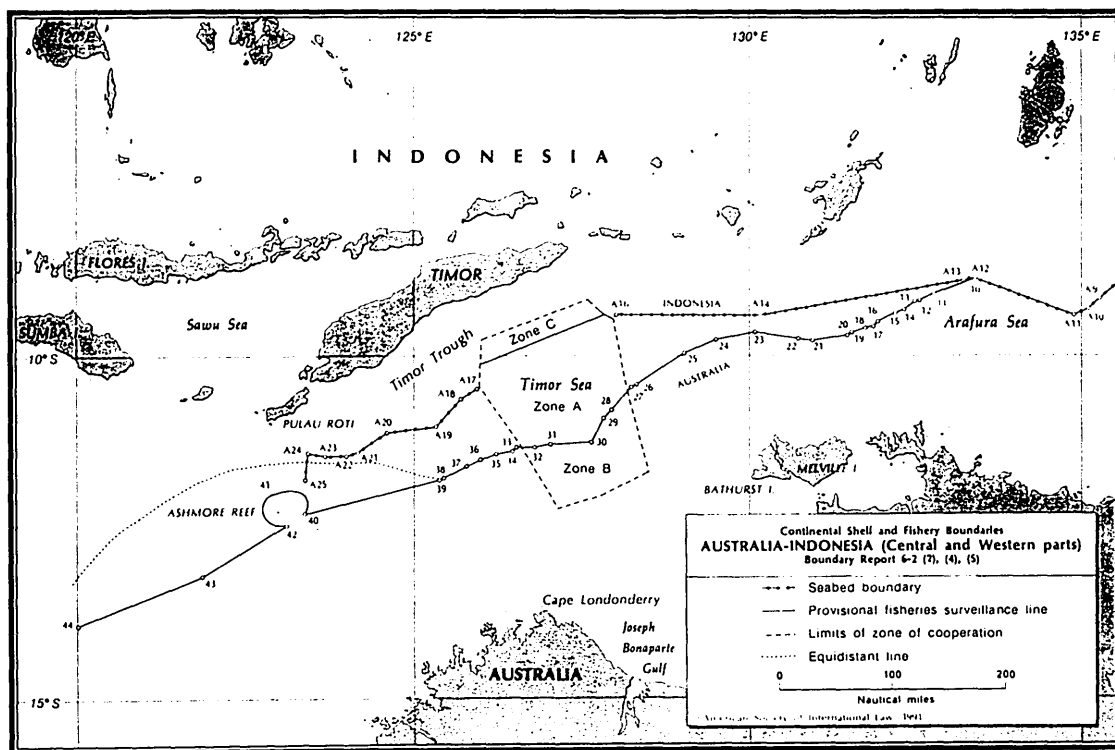


Figure: (8) Australia-Indonesia maritime boundaries.
Source: *International Maritime Boundaries*, at p.1237.

answer to Judge Schwebel in the *Tunisia v. Libya Case* asserted that the case where two states are “exercising sovereign rights over different resources in the same area” is not unknown in practice. See the *ICJ Pleadings, Tunisia v. Libya Case*, vol. 5, at p.503.

²⁰⁵ For the text of the agreement, see Charney and Alexander, *op. cit.*, n.165, at p.1238. It is worth mentioning here that in 1974 Australia recognized the operations of the Indonesia traditional fisherman in areas of the Australian EEZ. See *Ibid.*, at p.1239.

An explanation for these differences in state practice may lie in the issue of how far the parties are satisfied by the existing agreement. If one of them in a shelf agreement, for instance, was not entirely satisfied, he would reject any offer from the other party to accept the continental shelf boundary line as the boundary line between their respective EEZs. However, if the two parties were satisfied by their shelves' boundary line, there would be no reason why they should not regard this line as valid for their EEZs.²⁰⁶ This inconsistency in state practice led Professor Weil to disregard state practice, and to suggest that the question of a single line or separate lines "has to be treated on its own merits."²⁰⁷

Case law

The ICJ was seized for the first time with the task of drawing a single line for the shelf and EEZ (or EFZ) in the *Gulf of Maine Case*.²⁰⁸ The Chamber of the World Court acknowledged the general demand in state practice for a single delimitation for shelf and EEZ or EFZ boundary. This was "to avoid as far as possible the disadvantages inherent in a plurality of separate delimitations."²⁰⁹ In addition, the Chamber found that it would be possible, both legally²¹⁰ and materially²¹¹ to draw a single boundary for two different jurisdictions.²¹² In drawing such a line the Chamber went in search of criteria, and a method for delimitation not linked typically and exclusively to either of these two zones and "which does not give preferential treatment to one of these two objects to the detriment of the other, and at the same time is such as to be equally suitable to the division of either of them."²¹³ Judge Gros criticized the Chamber's decision in adopting a single line between two different zones, without seeking to establish

²⁰⁶ Weil, *op. cit.*, n.23, at p.118.

²⁰⁷ *Ibid.*, at p.132.

²⁰⁸ This is not to suggest that the question had never been raised before; see *Ibid.*, at p.120.

²⁰⁹ *Gulf of Maine Case*, at paras.194 and 161.

²¹⁰ Because "there is no rule of international law to the contrary." See para.27.

²¹¹ Because there is "no material impossibility" in the *Gulf of Maine*. See *Ibid.*

²¹² *Ibid.* Article 6 of the 1958 Convention on the Continental Shelf, the Chamber held, was not applicable, although the parties were both parties to the Geneva Convention on the Continental Shelf, in this case. To hold the opposite, it would "make the maritime water mass overlying the continental shelf a mere accessory of the Shelf." See para.119.

²¹³ *Ibid.*, at paras.193-4. See also the comments of Judge Gros, *op. cit.*, n.24, at pp.368-9, para.14.

“whether there existed in international law any rule prescribing or authorising the use of a single line for the continental shelf and the fishery zone.”²¹⁴

The next case where a third-party settlement was charged with drawing a single line was in the *Guinea/Guinea-Bissau Arbitration*.²¹⁵ However, the Tribunal did not raise the question of the legality of a single line or drawing such a line through reliance on the parties or on the rule of law. The Tribunal was not presented with any of these questions. So, it is right to say that the Tribunal added nothing to our understanding of the concept of a single boundary line.

In the 1992 Arbitration between *France and Canada*, the Tribunal also had the task of drawing a single line. In doing so, it adopted the same approach as the Chamber in the *Gulf of Maine Case*. Therefore, the Tribunal in 1992, like the previous two cases, added nothing further in the formulation or explanation of the concept of a single line.²¹⁶

Finally, and more recently, in the 1993 case concerning the maritime delimitation between Jan Mayen (Norway) and Greenland (Denmark), Denmark asked the Court to draw a single line, while Norway requested the Court to draw two different lines for the continental shelf and fishery zones. Although, these two lines would coincide, the two boundaries, according to Norway, would remain conceptually distinct. The Court rejected Denmark’s request to draw a single line due to the lack of a joint request from the parties to do so.²¹⁷ The Court did not elaborate upon the basis for its decision to reject the task of drawing a single line where there is no agreement between the parties.²¹⁸

The idea of a single boundary line has been rejected by some writers. Judge Gros, for example, held that:

A single boundary will establish a unity between the sea-bed and the exploitation of the subsoil on the one hand, and the water column with its resources on the other; it cannot be assumed

²¹⁴ Judge Gros, *op. cit.*, n.24, at p.363, para.5; p.367, para.12; pp.370-1, para.17; pp.372-3, para.19; and pp.376-7, para.25.

²¹⁵ *Guinea/Guinea-Bissau Award*, at para. 86; see also para.42.

²¹⁶ *France/Canada Award*, at para. 47.

²¹⁷ *Greenland v. Jan Mayen Case*, at paras.40-5.

²¹⁸ The ICJ in this case provided a further explanation that the phrase of special and relevant circumstances has a role to play in the concept of a single boundary line, similar to its role in the shelf delimitation. See *Ibid.*, at para.56. For further comment, see Evans, *op. cit.*, n.141, at pp.323-8.

that this unity is pre-existent. The two elements have always been treated separately. In 1958, there was one convention on the continental shelf and another on fishing.²¹⁹

Judge Oda has on various occasions asserted the desirability and the practicality of having a single boundary line for the continental shelf and the EEZ. Nevertheless, he has stressed that “the concept of a ‘single’ maritime boundary cannot be taken for granted. Whether the continental shelf or the EEZ should be given priority should have been agreed by both parties in advance. This is an important distinction, and one which cannot be over-emphasised. Indeed the Judgement in the *Jan Mayen* case is open to criticism for minimising it.”²²⁰

It seems fair to conclude that the task of drawing a line for each zone is the general rule, while the task of drawing a single line for different jurisdictions is dependent upon a joint request from the parties, since the notion of a single line has not been “established in either customary law or treaty.”²²¹

²¹⁹ See Judge Gros, *op. cit.*, n.24, at p.367, para.12 and p.370, para.16. See also Attard, *op. cit.*, at p.144, and pp.214-5; Professor Weil made an interesting distinction between three cases. First, where the continental shelf does not extend beyond the 200 nautical miles, there is no legal reason why a single line should not be adopted. Secondly, where the shelf extends beyond the 200 nautical miles, (the maximum limit for an EEZ), and the delimitation is between opposite coasts, there would be no question of an EEZ boundary, since the two opposite zones could not overlap, due to the fact that the distance between the two coasts is more than 400 nautical miles. Consequently, the delimitation would be limited to the shelf boundary. However, if the case is a delimitation between adjacent coasts, a single line will be invoked to determine the boundary up to 200 nautical miles. See Weil, *op. cit.*, n.23, at p.134.

²²⁰ See Oda, *op. cit.*, n.192, at p139. See also Judge Oda, *op. cit.*, n.15, at p.109, para.70.

²²¹ Judge Oda’s question to Denmark in the *Greenland v. Jan Mayen Case*. Quoted from Kwiatkowska, B., “Judge Shigeru Oda’s Opinions in the Law-of-the-Sea Cases: Equitable Maritime Boundary Delimitation,” 36 *German Yrbk* (1993), at p. 276.

Section Two

Special/Relevant Circumstance in Maritime Delimitation

The phrase “special circumstances” is introduced in Article 12 of the Territorial Sea and Contiguous Zone Convention of 1958, and Article 6 of the Continental Shelf Convention of 1958; whereas the phrase “relevant circumstances” is introduced into customary law by the Court in the *North Sea Cases*.²²² The former could be defined as a circumstance which excludes the application of the equidistance line,²²³ while the latter could be defined as a “fact to be taken into account in the delimitation process.”²²⁴ Some writers believe that the category of special circumstances is limited, while the category of relevant circumstances is open-ended.²²⁵ Moreover, that relevant “circumstances exist in all cases; special circumstances exist only in some.”²²⁶ The matter of special/relevant circumstance can best be analysed in two parts:

Part one: Special/Relevant Circumstances in General

A: Special Circumstances

The work of the ILC

Mr. François, the Special Rapporteur, made no reference to the concept of special circumstances in his initial draft for Article 7 of the 1953 Report. But Professor Sandström in his comment on Article 7 drew attention to the case where a departure from the general rule is necessary when, for example, the presence of a small island though opposite one state’s coast belongs to another state.²²⁷ François agreed with the view of Professor Sandström, that it was

²²² *North Sea Cases*, at para.101(C)(1) and para.101(D).

²²³ The Court in the *Greenland v. Jan Mayen Case* defined the concept of special circumstances as “circumstances which might modify the result produced by an unqualified application of the equidistance principle.” See para.55. See also the comment of Churchill on this definition. Churchill, *op. cit.*, n.163, at p.18.

²²⁴ *Greenland v. Jan Mayen Case*, at para.55.

²²⁵ See, for example, Churchill, *op. cit.*, n.163, at p.15, and pp.18-9; Brown, *op. cit.*, n.4, at pp. 74-5; Judge Shahabuddeen, *op. cit.*, n.12, at p.147.

²²⁶ Judge Shahabuddeen, *op. cit.*, n.12, at p.148.

²²⁷ *ILC Yearbook* (1953), vol. 1, at p.128, para.37.

necessary to provide both a general rule and exceptions to it.²²⁸ François therefore asserted that the median line, as a general rule and unless otherwise agreed, is the boundary line between the continental shelf area that appertains to two or more states whose coasts are opposite each other.²²⁹ However, Lauterpacht refused to accept the formula of a general rule on the ground that it “would deprive the rule of its legal character.”²³⁰ His objection was that Mr. François’s proposal, in Lauterpacht’s opinion, contained only a “half-way-house formula.” In this formula, which is difficult for any judge to interpret, “any party to a dispute could always argue that its case did not fall within the general rule, but formed an exception to it.”²³¹ Therefore, he declined to vote for this formula unless “the words ‘as a general rule’ were omitted, or [unless] the commentary was to contain a full explanation of them, giving specific instances of cases where a departure from the rule was permissible.”²³² Mr. Spiropoulos suggested the replacement of the “words ‘as a general rule’ by the words ‘unless another boundary line is justified by special circumstances.’”²³³ The Chairman expressed his support for this suggestion and asked Mr. François if he could accept Mr. Spiropoulos’s proposal. The Rapporteur showed that he would be prepared to accept such an amendment.²³⁴ The François formula was adopted, by 8 votes to 5, and was embodied in Article 7(2) of the ILC Report of 1953.²³⁵ The Commentary on the said Article indicated that: “As in the case of the boundaries of coastal waters, provision must be made for departures necessitated by any exceptional configuration of the coast, as well as the presence of islands or of navigable channels.”²³⁶ Article 7(2) (and its commentary) was adopted, in identical language, into Article 72 of the ILC final Report of 1956. However, where the

²²⁸ Ibid., at p.128, para.40 and p.131, para.14.

²²⁹ Ibid., at p.128, para.40; p.131, para.14, and p.134, para.53.

²³⁰ Ibid., at p.128, para.47.

²³¹ Ibid., at p.131, para.10.

²³² Ibid., at p.130, para.61, and see pp.128-30, paras.47 and 60; p.133, paras.10, 15 and 17; p.132, para.23. See also Brown, *op. cit.*, n.23, at p.55. And Grisel, E., “The Lateral Boundaries of the Continental Shelf and the Judgement of the International Court of Justice in the North Sea Continental Shelf Case,” 64 *AJIL* (1970), at p.580.

²³³ *ILC Yearbook* (1953), vol.1, at p.130, para.62.

²³⁴ Ibid., at p.133, paras.38 and 43.

²³⁵ Ibid., at pp.133-4.

phrases ‘the presence of islands’ or ‘navigable channels’²³⁷ are clear enough on their own, in contrast the phrase ‘any exceptional configuration of the coast’ is not. Consequently, an attempt to clarify its meaning will be made below.²³⁸

The Geneva Conference of 1958

The concept of special circumstances was one of the most controversial matters in the above Conference. This controversy reflected the fact that states were worried about the vagueness and uncertainty which the concept of special circumstances contained. The delegate from Yugoslavia, for instance, said that the concept of special circumstances is “both vague and arbitrary, and likely to give rise to misunderstanding and disagreement. The question was where and how such special circumstances were enumerated in international law and who could be charged with interpreting their application.”²³⁹ For that reason he proposed the deletion of any reference to special circumstances in Article 72. Similarly, Venezuela and the United Kingdom both submitted proposed amendments for Article 72, which contained no reference to the concept of special circumstances.²⁴⁰ Iran, to the contrary, accepted the formula in Article 72 on condition that the equidistance line should be measured, where special circumstances exist, from the high-water mark instead of the low-water mark. Similarly, Italy accepted in principle the formula of Article 72, but with the additional provision that specific mention of islands should be added.²⁴¹ The United States rejected the Italian and Iranian amendments.²⁴² Indonesia accepted the formula of Article 72 and opposed any attempt at amendment.²⁴³ In the

²³⁶ *ILC Yearbook* (1956), vol. 2, at p.300, para.37.

²³⁷ Because, as we have seen, navigation interests have no genuine link with the doctrine of the continental shelf, (rather are they connected with the concept of the territorial sea), there is a strong argument for examining navigation interests (as special circumstances) in the course of our discussion on the territorial sea delimitation. See the opinion of Mr. François, *ILC Yearbook* (1953), vol. 1, at p. 134, para. 53. And see above in Chapter Two at pp.78-9.

²³⁸ See below at pp.139-41.

²³⁹ *UNCLOS I Official Records*, vol. 6, at p.91, para.4.

²⁴⁰ *Ibid.*, at pp.134 and 138. Interestingly, Italy expressed its objection by not voting in favour of either the UK proposal or the Yugoslavian proposal. See *Ibid.*, at p.93, para.5.

²⁴¹ For the Iranian proposal, see *Ibid.*, at p.142. For further discussion on the Iranian position on the UNCLOS I, see Chapter Five/Section One. For the Italian proposal, see *Ibid.*, at p. 133.

²⁴² *Ibid.*, at p.95, paras.23-4.

²⁴³ *Ibid.*, at p.98, para.39.

subsequent vote the Yugoslavian and Venezuelan proposals to omit any reference to special circumstances were rejected. The Iranian and Italian proposals also failed to be approved.²⁴⁴ Interestingly, despite this high level of controversy the concept of special circumstances was approved and finds reflection in the two Geneva Conventions on the TSCZ and the Continental Shelf of 1958.²⁴⁵

B: Relevant circumstances

The concept of relevant circumstances was, as mentioned above, introduced by the Court in the *North Sea Cases*. The Court in this case was, as we have seen, charged with identifying the applicable rules and principles of international law that the parties could use to draw their respective shelf boundaries. Therefore, the Court addressed the following statement for the parties on determining the limit of relevant circumstances. It held that:

In fact, there is no legal limit to the considerations which States may take account of for the purpose of making sure that they apply equitable procedures.²⁴⁶

In contrast the Court in the *Libya v. Malta Case*, had the task of drawing the boundary line. It therefore added the following caveat:

Yet although there may be no legal limit to the considerations which States may take account of, this can hardly be true for a court applying equitable procedures. For a court, although there is assuredly no closed list of considerations, it is evident that only those that are pertinent to the institution of the continental shelf as it has developed within the law, and to the application of equitable principles to its delimitation, will qualify for inclusion. Otherwise, the legal concept of continental shelf could itself be fundamentally changed by the introduction of considerations strange to its nature.²⁴⁷

Therefore, while the matter of relevant circumstances had been left totally to the freedom of the states during their negotiations, it had been limited to the circumstances which fit in with the theory of the continental shelf in any third-party settlement.²⁴⁸ It follows that state practice is not the proper place to search

²⁴⁴ See here Professor Bowett's comments on the rejection of the Iranian and Italian proposals in the Conference: Bowett, *op. cit.*, n.27, at p.153. See also Chapter Five for further discussion on the Iranian position before the UNCLOS I.

²⁴⁵ The two 1958 Conventions did not "define 'special circumstances' nor lay down the criterion by which it is to be assessed whether any given circumstances justify a boundary line other than the equidistance line." *Anglo/French Arbitration*, at para.70.

²⁴⁶ *North Sea Cases*, at para.93.

²⁴⁷ *Libya v. Malta Case*, at para.48.

²⁴⁸ Weil, *op. cit.*, n.23, at p.214.

for factors which constitute relevant circumstances. Hence international decisions are the only places where we can identify the factors which have been accepted and those which have been rejected as relevant circumstances.²⁴⁹

The difference between the two concepts

The difference between the concept of special circumstances and the concept of relevant circumstances is twofold: they are different both in scope, and in the role which has been attached to them.

(1) The scope of special and relevant circumstances

The commentary on Article 7(2) of the ILC Report of 1953, as we have seen, specified as special circumstances the following factors: “exceptional configuration of the coast and the presence of islands or of navigable channels.”²⁵⁰ These factors, with the exception of navigable channels (which, as noted, have no role in continental shelf delimitation)²⁵¹ might be categorized as geographical factors. It might be suggested that non-geographical factors, such as security and economic factors, cannot be categorized as special circumstances within the meaning of Article 6. However, under customary law, these non-geographical factors together with geographical factors may be categorized as relevant circumstances. In short, relevant circumstances may include geographical and non-geographical factors, whereas special circumstances may include only geographical factors. Moreover, factors which constitute special circumstances would also constitute relevant circumstances. The converse, however, is not true.²⁵²

²⁴⁹ In addition, the acceptance of some factors as relevant circumstances has not ruled out the possibility of acceptance of new factors, which have not as yet been claimed before a third-party settlement. See O’Connell, *op. cit.*, n.19, at pp.708-9. See also Judge Weeramantry, *op. cit.*, n.24, at p.220, para.27; Weil, P., “Geographic Consideration in Maritime Delimitation,” *International Maritime Boundaries*, vol. I Charney and Alexander (eds.), Martinus Nijhoff Publishers, the Netherlands (1993), at p.121.

²⁵⁰ *ILC Yearbook* (1956), vol. 2, at p.300, para.37.

²⁵¹ See above at p.79, note 95.

²⁵² Brown, *op. cit.*, n.4, at p.104. See also below, where some relevant circumstances have been attributed a role similar to the role of special circumstances.

(2) *The role of the two concepts*

(a) The role of special circumstances in the delimitation process

Special circumstances have a corrective role to play.²⁵³ The court or tribunal, by using the phrase “special circumstances”, can justify the exclusion of the application of the equidistance principle *in toto*, or adjust the equidistance line in some sector where special circumstances are present. This exclusion or adjustment is dependent upon the weight which is given to the special circumstances in the light of the equitable principles. The court or tribunal can decide, in order to reach an equitable result, how much effect should be given to the special circumstance which is present in the area. The Court of Arbitration in the *Anglo/French Award*, for example, gave half effect continental shelf to the Scilly Isles, because the equitable principles had suggested the inappropriateness of giving full effect to them.²⁵⁴

(b) The role of relevant circumstances in the delimitation process

Whereas special circumstances can have only one role to play in the formula of Article 6, relevant circumstances can have under customary law three different roles to play in the delimitation process. This is because the scope of relevant circumstances includes three factors, namely geographical configuration of the coasts, special geographical features and non-geographical factors. The roles of each of these different factors are as follows:

²⁵³ Evans, M., *Relevant Circumstances and Maritime Delimitation*, Claredon Press, Oxford (1989), at p.79. The Court of Arbitration in the *Anglo/French Arbitration* suggested a slightly different role for special circumstances. This role was a qualifying one to ensure the equitable character of the equidistance principle in each case. See *Anglo/French Arbitration*, at para.70. A similar role seems to be suggested by the World Court in the *Greenland v. Jan Mayen Case*, at para.55. See also above for more discussion on the court interpretation of the formula of Article 6.

²⁵⁴ *Anglo/French*, at para.251. For further discussion on the effect of the Scilly Isles, see Chapter Six/Section Two.

An indicative role

This role is exercised at the early stage of the process to indicate the proper method for the delimitation. This method should be determined by reference to the geographical configuration of the two parties' coastlines.²⁵⁵

A corrective role

At the second stage of delimitation the court or arbitral tribunal may be faced with a special geographical feature in the delimitation area. This feature, such as an island, may require an adjustment in the boundary line that constructed by reference to the coasts of the parties. Such an adjustment might be necessary in order to reach an equitable result in the delimitation. How much adjustment is required is a matter to be assessed, as with the case of special circumstances, in the light of equitable principles. The Tunisian islands of Kerkennah in the *Tunisia v. Libya Case* may serve as a good example. Here, the Court adjusted the perpendicular boundary line between the two parties towards Libya to give half effect continental shelf to the Kerkennah islands.²⁵⁶ The Court here attributed to relevant circumstances a role of melioration or correction similar to that suggested for special circumstances, where Article 6 is applicable. Subsequent international decisions followed, taking a similar position where an unusual geographical feature was present in the delimitation area.²⁵⁷

Checking and confirming the equitableness of the result

At the final stage of the delimitation, international adjudication may use non-geographical considerations to confirm or test the equitableness of the line drawn initially by reference to geographical factors.²⁵⁸ In the *Gulf of Maine Case*, for

²⁵⁵ *North Sea Cases*, at para. 96; *Anglo/French Arbitration*, para. 248; *Tunisia v. Libya*, paras. 74 and 63; *Gulf of Maine*, at paras. 59, 195, 205 and 231. See also Weil, *op. cit.*, n.23, at p.71. It is interesting to note that the World Court in the *Tunisia v. Libya Case* depended on the conduct of the parties in adopting a *de facto* boundary line between them and on "the factor of perpendicularity to the coast and the concept of prolongation of the general direction of the land boundary", in drawing the boundary line between Tunisia and Libya. See paras.118 and 120 of the judgement.

²⁵⁶ *Tunisia v. Libya Case*, at para.129.

²⁵⁷ For more examples, see Evans, *op. cit.*, n.253, at p.80.

²⁵⁸ Judge Weeramantry, *op. cit.*, n.24, at p.269, para.219. Similarly, see Weil, *op. cit.*, n.23, at pp.261-3, and 266. Interestingly, there is no parallel role for special circumstances in the formula

example, the Chamber tested the overall result against economic factors to avoid catastrophic repercussions for the livelihood and economic well-being of the population of the two parties as a result of the delimitation.²⁵⁹ In a similar manner, the ICJ in the *Greenland-Jan Mayen Case*, used security interest as one criterion, among others, to confirm the equitable character of the result.²⁶⁰ Hence, non-geographical considerations cannot be regarded “as exercising a decisive influence on the delimitation of the boundary.”²⁶¹

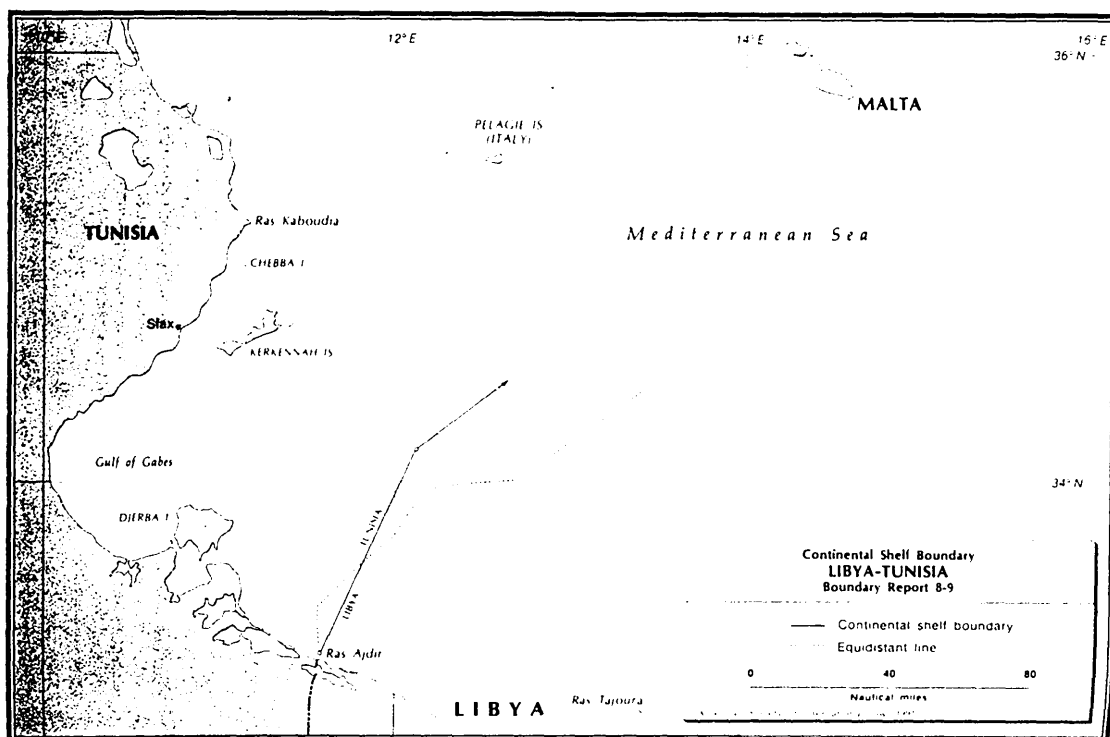


Figure: (9) Kerkennah Island effect on the Perpendicular line.
Source: ICJ Reports 1982, at p.90.

of Article 6. This is because there is a presumption in favour of the equidistance method as leading *prima facie* to an equitable result; see above at p.96.

²⁵⁹ *Gulf of Maine Case*, at para.237.

²⁶⁰ The Court in this respect stated that: “While courts have been unwilling to allow such considerations of security to intrude upon the major task of establishing a primary boundary in accordance with the geographical criteria, they are concerned to avoid creating conditions of imbalance.” *Greenland v. Jan Mayen Case*, at para. 81. See also Weil, *op. cit.*, n.23, at p.265. See also below.

²⁶¹ *Anglo/French Arbitration*, para. 188. See also Charney, J. I., “The Delimitation of Ocean Boundaries,” 18 *ODIL* (1987), at p.508; Charney, *op. cit.*, n.41, at p.240.

It seems right to conclude that a corrective and a meliorating role has been played by exceptional geographical circumstances, of which islands are a clear example. These circumstances may be characterized as special, where Article 6 is applicable, or as relevant, where Article 6 is not. Geographical configuration of the coasts has been used under the guise of relevant circumstances to indicate the proper method for delimitation in a particular case.²⁶² Finally, it seems correct to suggest that there is a hierarchical relationship within the concept of relevant circumstances between geographical and non-geographical considerations. The former, usually, have been utilized at an early stage of the delimitation process, whereas the latter have usually been used in the final stage as a test of the equitableness of the result.²⁶³ The result of this hierarchical relation is that the burden of proof for the inequitableness of the result on the basis of some non-geographical considerations is placed “on the party seeking to adjust or displace the line initially determined on the basis of geographical factors and criteria.”²⁶⁴

Having said that special circumstances and relevant circumstances are different, the Court in the *Greenland v. Jan Mayen Case*, nevertheless assimilated the two categories in the case of opposite states. The Court stated that:

Although it is a matter of categories which are different in origin and in name, there is inevitably a tendency towards assimilation between the special circumstances of Article 6 of the 1958 Convention and the relevant circumstances under customary law, and this if only because they both are intended to enable the achievement of an equitable result.²⁶⁵

However, the Court was criticized for its position by Judge Shahabuddeen in his separate opinion.²⁶⁶ His view was that the expression “special circumstances” is useful only where such circumstances are present, to exclude the obligation of applying the equidistance method. Whereas the expression “relevant

²⁶² The reason why special circumstances cannot play an indicating role is that Article 6 has already provided the applicable method for the delimitation.

²⁶³ In the *Tunisia v. Libya Case* the Court invoked proportionality to test the equitableness of the overall result, despite the fact that proportionality fell into the geographical category. See paras. 103-4 of the judgement. For more discussion on proportionality, see below.

²⁶⁴ Legault and Hankey, *op. cit.*, n.86, at p.971. Similarly, see Charney, *op. cit.*, n.261, at pp.519-20.

²⁶⁵ *Greenland v. Jan Mayen Case*, at para. 56.

²⁶⁶ Judge Shahabuddeen, *op. cit.*, n.12, at p.144. In addition, the court is still open to criticism for missing the opportunity to narrow the open-ended character of the concept of relevant circumstances.

circumstances” is useful in choosing the most suitable method, amongst many, to be applied to arrive at an equitable result in the delimitation. Therefore, the presence of the former will prevent, in most cases, the application of the equidistance method. By way of contrast, the presence of the latter, which are always present because they in themselves characterize the area of delimitation, would necessitate the application of the equidistance method if this was the most equitable method for delimitation, or could, on the other hand, prevent its application if it was not. Therefore, he continued, it is inapt that special circumstances should be “read as a reference to all relevant circumstances in the light of which a choice is to be made among any of a number of possible methods (including equidistance) with a view to producing the most equitable delimitation.”²⁶⁷

Part two: Specific Special/Relevant Circumstances

In maritime boundary delimitation, litigants in order to strengthen their cases may address a number of factors as special or as relevant circumstances. These factors may be classified in two main categories: (1) geographical factors; (2) non-geographical factors. The remainder of this Chapter will focus on these factors in terms of being accepted or not ²⁶⁸ as special ²⁶⁹ or as relevant circumstances.²⁷⁰

A: Geographical Factors

The principle that the land dominates the sea, or that “the land is the legal source of the power which a State may exercise over territorial extensions,”²⁷¹ makes the geographical features of an area the primary element which governs the bearing of a boundary line. It is not surprising, therefore, to find that geographical features have been regarded as a special circumstance, as

²⁶⁷ Ibid., at pp.147-9.

²⁶⁸ For a possible reason why states invoked before third-party settlement as special or relevant circumstances factors that were not truly connected with the continental shelf doctrine, see Lowe, *op. cit.*, n.50, at p.69.

²⁶⁹ As suggested above, the scope of special circumstances is limited to geographical factors only.

²⁷⁰ Relevant circumstances as noted contain geographical and non-geographical factors.

²⁷¹ *North Sea Cases*, at para.96.

well as a relevant circumstance. The Tribunal in the *France/Canada Award* stated that “geographical features are at the heart of the delimitation process.”²⁷²

In the commentary of the ILC to its Report of 1956, geographical features were listed as a special circumstance if they constituted an “exceptional geographical configuration.” The commentary did not, however, elaborate on the meaning of “exceptional geographical configuration.” In the *North Sea Cases*, Germany made an attempt to explain its meaning by invoking the concept of abnormal geographical features. Germany argued that “the normal [geographical feature]...is a more or less straight coastline.”²⁷³ A coast would be characterized as abnormal if it were not straight. A concave or convex coastline is, consequently, an exceptional geographical configuration, which constitutes a special circumstance, and requires a departure from the equidistance principle.²⁷⁴ The Court which not agreeing with the German interpretation, did not give its own.²⁷⁵ In addition, Grisel found that the phrase “any exceptional configuration of the coastline” to be obscure, because “there are not two identical shores on the globe, and it therefore is hard to establish what is the rule and what is the exception in that matter.”²⁷⁶ Professor Brown, however, held that “the most frequent cause of such exceptional configuration is the presence of islands on the continental shelf.”²⁷⁷

In customary law the Court in the *North Sea Cases* introduced the phrase “the geographical configuration of the coasts” as a relevant circumstance for delimitation purposes.²⁷⁸ Subsequent international decisions have stressed the importance of the geographical configuration of an area as a relevant circumstance. In the *Anglo/French Arbitration*, for example, the Court of Arbitration stated that “it is the geographical circumstances which primarily determine the appropriateness of equidistance or any other method of delimitation

²⁷² *France/Canada Award*, at para.24.

²⁷³ Federal Republic of Germany Memorial, ICJ *Pleadings 1969*, vol. 1, at pp.68-9, para.70.

²⁷⁴ Denmark and the Netherlands rejected this interpretation. *North Sea Cases*, at para.13.

²⁷⁵ This was because the court found it was pointless to go into a detailed discussion regarding Article 6 when the article itself was not applicable. See *Ibid.*, at para.82.

²⁷⁶ Grisel, *op. cit.*, n.232, at p.582.

²⁷⁷ Brown, *op. cit.*, n.4, at p.76.

²⁷⁸ *North Sea Cases*, at para.96.

in any given case.”²⁷⁹ This being so, no further details were given on the content of geographical considerations, except the fact that some geographical features, like the coastline being convex or concave and the relationship of the coastline as opposite or adjacent, have frequently been stressed as “special/relevant circumstances.” For example, the Court in the *North Sea Cases* accepted the convexity and concavity of the parties’ coastline in the North Sea regime as a relevant circumstance. Similarly, the Tribunal in the *Guinea/Guinea-Bissau Award*, and in the *France/Canada Award* accepted this too.²⁸⁰

In addition, there are a number of geographical factors which have played some role in the delimitation process. These include the presence of islands and proportionality. In the interests of clarity we shall discuss a number of these factors which have often been raised in the context of third-party adjudication.

Islands

As noted in Chapter One of the present work, the coastal state, generally speaking, has the right to claim for an island all the maritime zones which are recognized in international law. However, the matter is quite different where the entitlement of an island has arisen in the context of maritime delimitation. In Chapter Six we shall examine in some detail the effect of islands in territorial sea and continental shelf delimitation. This discussion is necessary in order to provide a proper legal context for our analysis of the possible effect of certain islands on the boundary line between Iran and the UAE. In the present context it is sufficient to make the point that the presence of islands has in many instances been the cause of disputes in the drawing of boundary line.²⁸¹ In delimitation,

²⁷⁹ *Anglo/French Arbitration*, at para.96. The difference between the concept of “any exceptional configuration of the coastline” in the treaty law and “the geographical configuration of the coasts” in the customary law, on first impression, is that the former is limited whereas the latter is not.

²⁸⁰ *North Sea Cases*, at paras.56, 89 and 91; *Guinea/Guinea-Bissau Award*, at para.103; *France/Canada Award*, at paras. 26, 28 and 34.

²⁸¹ Gutteridge, J.A.C., “The 1958 Geneva Convention on the Continental Shelf,” 35 *BYBIL* (1959), at p.120; Boyle, A.E., “Maritime Boundaries and UNCLOS: Some Current Problems,” (unpublished paper) Greenwich Forum, 30 May 1996, at pp.1 and 2. A number of examples of continental shelf boundaries delimitation complicated by the presence of islands have been cited in Boyle’s paper, *Ibid.*, at pp.2-4, and in Symmons, C., *The Maritime Zones of Islands in International Law*, vol. I, Martinus Nijhoff, the Netherlands (1979), at pp.183-9.

islands situated between two mainlands do not generate maritime zones to their full extend, if the outcome of such an extension would be to cause an inequitable result in the delimitation.²⁸² Consideration of equitable principles may lead to giving islands full, or half or no effect at all.

*The principle of proportionality*²⁸³

What is the role of proportionality in continental shelf delimitation?²⁸⁴ Is it a source of title? Or is it a fact that constitutes a special circumstance? Or is it a criterion to be used to test *ex post facto* the equitableness of an equidistance line (or any provisional line determined by another method) or a line resulting from its adjustment? Or, finally, is it an element to be used to determine how much a provisional line needs to be tilted, or how much effect needs to be given to an incidental geographical feature in order to reach an overall equitable result for the delimitation?

Before we proceed to answer these questions, it would be valuable to determine the meaning of proportionality. The concept of proportionality in shelf delimitation has been considered as “a correlation between the ratio of coastal length and the ratio of surface areas.”²⁸⁵

²⁸² Politakis, G., “The 1993 Jan Mayen Judgement: The End of Illusions,” 41 *NILR* (1994), at p.27.

²⁸³ The idea of proportionality was introduced for the first time in the context of continental shelf delimitation by Vallat in his comment in 1946 on a possible method of resolving the continental shelf boundary problem, in which he said:

“Where a large bay or a gulf is bounded by several states the problem is more complicated. Perhaps the most equitable solution would be to divide the submarine area...among the contiguous states in proportion to the length of their coast lines.” See Vallat, “The Continental Shelf,” 23 *BYBIL* (1946), at pp.335-6. For some historical discussion on the relationship between the concept of proportionality and maritime boundary delimitation, see Rhee, S.M., “Sea Boundary Delimitation between States before World War II,” 76 *AJIL* (1982), at pp.556-7.

²⁸⁴ This examination is limited, as mentioned earlier, to the position in the case law. For a discussion on proportionality in state practices, see Legault and Hankey, “Method, Oppositeness and Adjacency, and Proportionality in Maritime Boundary Delimitation,” *International Maritime Boundaries*, vol. I, Charney and Alexander (eds.), Martinus Nijhoff Publishers, the Netherlands (1993), at p.219. See also Schulte H Nordholt, “Delimitation of Continental shelf in the East China Sea,” 32 *NILR* (1985), at pp.155-6.

²⁸⁵ Weil, *op. cit.*, n.23, at p.236. See also *Tunisia v. Libya Case*, at para.104.

(1) Proportionality as a source of title

Despite the fact that the coastal front gives a state the right to maritime jurisdiction, it should not be used as an independent principle of delimitation.²⁸⁶ In this sense, the length of the coastline could not be regarded as a source of title nor could it dictate the total area of shelf to which a coastal state is entitled. Otherwise, states which have equal coastlines should have an equal area of shelf. This, however, is not true in practice. The case of the *Anglo/French Arbitration* may serve as a good example. The Court in this Award found that the lengths of the English and the French coasts were approximately equal in the Channel area.²⁸⁷ Nevertheless, in the delimitation of the continental shelf boundary between them the Court allocated to the English coast a larger area. This was because the presence of the British islands in the area gave the English coast additional area of the continental shelf. Thus, the overall area of the continental shelf which had been attributed to Britain became larger than that which had been given to France.²⁸⁸

This may demonstrate the fact that the length of a state's coastline is not the source of title. The Court in the above mentioned Award put this conclusion particularly clearly by holding that "proportionality is not in itself a source of title."²⁸⁹ The result is that "a maritime delimitation can certainly not be established by a direct division of the area in dispute proportional to the respective lengths of the coasts belonging to the parties in the relevant area."²⁹⁰

(2) Proportionality as a special/relevant circumstance

There have been three cases to date where proportionality has been attributed a meliorating role to correct a provisional equidistance line (or any other line resulting from applying another method). These three cases are the *Gulf of Maine*

²⁸⁶ *Gulf of Maine Case*, at para.218. See also Brownlie, *op. cit.*, n.52, at p.228.

²⁸⁷ *Anglo/French Arbitration*, at paras.181, 196 and 201.

²⁸⁸ *Ibid.*, at para. 202.

²⁸⁹ *Ibid.*, at para.101. Similarly the Court in the *Dubai/Sharjah Award* emphasized that: "proportionality, although not a source of title, was a 'valuable indication of what is equitable'." *Dubai/Sharjah Award*, at p.665; *France/ Canada Award*, at para. 45. See also Brownlie, *op. cit.*, n.52, at p.228.

²⁹⁰ *Gulf of Maine Case*, at para.185; see also para.218.

Case,²⁹¹ the *Libya v. Malta Case*²⁹² and the *Greenland v. Jan Mayen Case*.²⁹³ In these cases the World Court considered the disparity in length between the two coastlines of the parties as a special/relevant circumstance calling for adjustment of the equidistance line to the advantage of the state with the longer coastline.²⁹⁴ Hence, states with a long coastline were attributed a large share of the delimitation area.²⁹⁵

This role is, however, contrary to the submission that proportionality is not a source of title, and thus it should have no decisive role in the delimitation whereby a state with a long coastline should have the lion's share of the shelf area in proportion to the ratio of the length of its coastline. Otherwise there is no room for any other rules of maritime delimitation, since the delimitation operation would be "based only on figures reflecting the length of the coastline."²⁹⁶

It was not surprising, therefore, that the decision of the World Court in the *Gulf of Maine*, the *Libya v. Malta* and the *Greenland v. Jan Mayen Cases* to give proportionality a decisive role was subject to strong criticism from a number of international writers. Weil, for example, condemned the Court's position in the *Libya v. Malta Case* stating that:

the equality of coastal lengths cannot be regarded as the *sine qua non* of the equity of an equidistance line...The recognition in *Libya/Malta* that the comparison of coastal lengths is a

²⁹¹ Paras. 184 and 218.

²⁹² Paras. 68, 66-7.

²⁹³ Paras. 68-9. See Judge Schwebel's criticism of the Court decision, *ICJ Reports 1993*, at p. 126-7. See also Judge Oda's separate opinion in this Case, at p.115, para.92. Similarly, the remark of Professor Kwiatkowska in: "Equitable Maritime Boundary Delimitation," Essay in Honour of Sir R.Y. Jennings, *Fifty Years of the International Court of Justice*, Lowe and Fitzmaurice (eds), Cambridge University Press, Cambridge (1996), at p.286; and finally see the comment of Charney, *op. cit.*, n.41, at pp.242-4

²⁹⁴ The disparity between the coastal length of the two states should be so great that it is able to be understood by a simple glance at the map and not by exact mathematical calculation. In other words the length of the two coasts should be noticeably different. *Libya v. Malta Case*, at paras. 66-7.

²⁹⁵ *Libya v. Malta Case*, at para.68. See also Judges Ruda, Bedjaoui and Aréchaga, their joint separate opinions in the *Libya v. Malta Case*, in which they supported the correction role for proportionality, at pp.82-4, paras.20-1; and see also Weil in his answering of the position of the three judges, Weil, *op. cit.*, n.23, at pp.75-9.

²⁹⁶ *Guinea/Guinea-Bissau Award*, at para.120. See also Professor Weil's argument before the ICJ in the *Greenland v. Jan Mayen Case*; summarized in Politakis, *op. cit.*, n.282 at p.13.

relevant circumstance is incompatible with the doctrine professed in this same judgement on the link between title and delimitation, and with its definition of legal relevance.²⁹⁷

(3) Proportionality as a test for the equitableness of the result

In this sense it would mean that the court or tribunal would check the outcome of the delimitation *ex post facto* to ensure that the boundary line that has resulted “does not involve an unreasonable disproportion between the ratio of the areas and that of the coastal lengths.”²⁹⁸ This evaluative role for proportionality was said to be its classic function, which was suggested in the *North Sea Cases*,²⁹⁹ and was adhered to by the Court in the *Tunisia v. Libya Case*,³⁰⁰ in the *Libya v. Malta Case*³⁰¹ and in the *France/Canada Award*.³⁰²

Using proportionality as a test, however, is not always easy. This may sometimes be due to the difficulty of identifying the relevant coast and the relevant area of delimitation.³⁰³ This difficulty usually arises where one or both parties have a boundary with a third state which is yet to be determined.³⁰⁴ The *Channel Islands Award* and the *Libya v. Malta Case* may be cited as examples; where the calculation of the length of the relevant coastline would inevitably entail calculating an area of the coast of one or both parties, which itself may be affected in any future delimitation between that party and a third state. This

²⁹⁷ Weil, *op. cit.*, n.23, at p. 243. Similar criticism was expressed by Judge Oda in his dissenting opinion in the *Libya v. Malta Case*, at p.138, para.26, and Judge Schwebel in his dissenting opinion of the same case, at p.183, note 145. See also Frank, *op. cit.*, n.52, at p.72.

²⁹⁸ See Weil, *op. cit.*, n.23, at p.236.

²⁹⁹ The World Court in this case said that the role of proportionality is “to establish the necessary balance between States with straight and those with markedly concave or convex coasts, or to reduce very irregular coastlines to their truer proportions.” *North Sea Cases*, at para. 98. It should be noted that the court in this case was in charge only of identifying the rules that govern the delimitation.

³⁰⁰ *Tunisia v. Libya Case*, at paras.103, 104 and 130.

³⁰¹ Although proportionality had been invoked in this case as a special circumstance, it was used in the final stage of the delimitation process as a test *ex-post facto* to test the equidistance of the boundary line. This test was based on a broad assessment, rather than an exact calculation. See paras.174-5. The Court’s conclusion was that “there is certainly no evident disproportion.” See para.75. Interestingly, the outcome of the test was usually to affirm that the result did not contain disproportionately distorting effects. This is, in the words of Professor Weil, because “the data on which the arithmetical test is based are in reality selected so as to confirm a predetermined result.” See Weil’s dissenting opinion in the *France/Canada Award*, at p.1207, para.25.

³⁰² *France/Canada Award*, at para. 45. See the comment of Charney, *op. cit.*, n.41, at pp.241-2.

³⁰³ Weil’s dissenting opinion in the *France/Canada Award*, at para.24.

³⁰⁴ Or where the parties agreed to limit the task of the court or tribunal to draw the boundary line between some parts of their boundary. See, for example, the task of the Chamber in the *Gulf of Maine Case*, at para. 23. For an example of such a case in state practice, see Chapter Five.

possible effect would probably overthrow the figures and ratios arrived at in the judgement.³⁰⁵

(4) Proportionality as an equitable consideration

This is to say that proportionality is an element, among others, in determining whether giving an effect for an incidental geographical feature would produce an inequitable result. This role, which was suggested by the Court of Arbitration in the *Anglo/French Arbitration*, is to avoid the inequitable outcome which would result from giving a certain feature an excessive weight in the delimitation.³⁰⁶ Professor Brown, in his comment on the Court's reinterpretation of the role of proportionality, wrote that the Court viewed proportionality as an aid that may be used "to help in establishing whether a particular feature does constitute special circumstances because of its unjust distorting effects."³⁰⁷ Brownlie, however, considered this role of proportionality, as suggested in the *Anglo/French Arbitration*, as the general form of "*ex post facto* verification of a line arrived at on the basis of other criteria."³⁰⁸

In contrast to the previous roles suggested above, this role for proportionality might be seen as reasonable, because it would not attribute a decisive role for proportionality, and it is free from the difficulty that may arise in using proportionality as a test of equity. Moreover, this suggestion role is similar to the equitable principles role in maritime delimitation, where the effects of special or relevant circumstances need to be determined in the light of these principles.³⁰⁹

³⁰⁵ *Libya v. Malta Case*, at para.74. See also Weil, *op. cit.*, n.23, at p.241.

³⁰⁶ The Court of Arbitration in the *Anglo/French Award* regarding the role of proportionality held that: "In the present case, the role of proportionality in the delimitation of the continental shelf is, in the view of this Court, a broader one, not linked to any specific geographical feature. It is rather a factor to be taken into account in appreciating the effects of geographical features on the equitable or inequitable character of a delimitation, and in particular of a delimitation by application of the equidistance method." See para.99, see also para.100. And see Frank, *op. cit.*, n.52, at p.65.

³⁰⁷ Brown, *op. cit.*, n.4, at p.112.

³⁰⁸ The exceptional form in his view is the "form of a ration loosely based on the length of the respective coastal line." Brownlie, *op. cit.*, n.52, at pp.228-9.

³⁰⁹ A similar view was held by Belcher, Advocate of the Supreme Court of South Africa. He held that: "proportionality, in my view, is an equitable principle, even if it does not approximate the status of a rule of treaty or customary law, as does the equitable principle of equidistance. Like the principle of equidistance, proportionality will not necessarily govern a delimitation of continental shelf, but a gain like equidistance, that does not make it any the less an equitable

The delimitation and the interests of other states in the region

There is no doubt that the effect of any agreement or international decision “has no binding force except between the parties and in respect of that particular [area].”³¹⁰ However, on several occasions the parties in an international adjudication claimed, and the court or tribunal admitted, the relevance of the other states’ delimitation practice as a relevant circumstance. The Tribunal in *Guinea/Guinea-Bissau Award*, expressed this clearly:

A delimitation designed to obtain an equitable result cannot ignore the other delimitations already made or still to be made in the region.³¹¹

The relevance of regional practice is not because it has any effect beyond its parties, but merely because it constitutes a geographical feature, which the court or tribunal is required to take into account.³¹² Further, another reason which may justify the relevance of other state practice in the area is that it is desirable that the present delimitation fits together with pre-existing delimitations in a unified whole. The Court of Arbitration in the *Dubai/Sharjah Award* admitted the need for the delimitation to “be consistent...with comparable regional practice.”³¹³

This is the case where there is an existing regional practice. However, there may be a case where other states have potential claims in the delimitation area. The Court in the *Libya v. Malta Case*, faced with such a situation, solved the problem by limiting its jurisdiction to the area where a third state had laid no claim to it.³¹⁴ The Court stated in this context:

The present decision must...be limited in geographical scope so as to leave the claims of Italy unaffected, that is to say that the decision of the Court must be confined to the area in which, as the Court has been informed by Italy, that State has no claims to continental shelf rights.³¹⁵

principle.” See Blecher, M.D., “Equitable Delimitation of Continental Shelf,” 73 *AJIL* (1979), at p.77. And also held by Legault and Hankey, *op. cit.*, n.284, at p.222. For the role of the equitable principles, see Section One above.

³¹⁰ Article 59 of the statute of the ICJ. See also the world Court Judgement in *Application by Italy to intervene in Libya v. Malta Case*, at para.42; *Burkina Faso v. Mali Case*, at para.46.

³¹¹ *Guinea/Guinea-Bissau Award*, at para.93. In addition, the Tribunal said: “in its assessment, the Tribunal could not take into consideration a delimitation which did not result from negotiations or an equivalent act in accordance with international law.” See para.94.

³¹² Evans, *op. cit.*, n.253, at p.234.

³¹³ *Dubai/Sharjah Award*, at p.677. See also Evans, *op. cit.*, n.253, at p.235.

³¹⁴ For an example of such a problem in state practice, see Chapter Five.

³¹⁵ *Libya v. Malta Case*, at para.21. See also *Tunisia v. Libya Case*, at paras.42, 75 and 81; *Burkina Faso v. Mali Case*, at para.47.

The Court position, however, was criticized by some writers. Weil, for example, wrote that the restriction which the Court imposed upon the geographical scope of the delimitation area was hardly justifiable. This was because the principle of *res inter alios judicata*³¹⁶ would reserve the third state interest.³¹⁷ As a result, he continued, there is no reason why the interest of other states should be regarded as a relevant circumstance in the delimitation process.³¹⁸

Land mass

The idea that the land dominates the sea, and that the geographical configurations of the coast have an important role in the delimitation should be distinguished from the land mass behind the coast. The latter has been rejected by third parties as constituting a relevant circumstance. The Tribunal in *Guinea v. Guinea-Bissau Award* stated that:

As for proportionality with relation to the land mass of each State, the Tribunal considers that this does not constitute a relevant factor in this case. The rights which a State may claim to have over the sea are not related to the extent of the territory behind its coasts, but to the coasts themselves and to the manner in which they border this territory. A State with a fairly small land area may well be justified in claiming a much more extensive maritime territory than a larger country. Everything depends on their respective maritime facades and their formations.³¹⁹

However, the rejection of the disparity between the land mass of the parties as a relevant circumstance should be, again, distinguished from the difference in the length of the coastlines of the parties. This, as we have seen, is acceptable as a relevant circumstance though with some controversy as to its role in the delimitation process.³²⁰

³¹⁶ For further discussion on this principle, see Cheng, *op. cit.*, n.17, at pp.340-3.

³¹⁷ See Weil, *op. cit.*, n.23, at p.255.

³¹⁸ A similar position was held by Weil in regard to the relevance of other states delimitation in the region. See Weil, *op. cit.*, n.23, at p. 256. For further criticism, see Judge Schwebel dissenting opinion in the *Libya v. Malta Case*, at pp. 172-8.

³¹⁹ *Guinea/Guinea-Bissau Award*, at para.119; *Libya v. Malta Case*, at para.49; *France/Canada Award*, at paras.44-5.

³²⁰ See above at pp.142-6.

B: Non-Geographical Factors

*The conduct of the parties*³²¹

The conduct of the parties in regard to maritime delimitation can take the following forms:-

(1) Activity

The parties may conduct two types of activities within the area involved:

(a) **Fishing:** Whether or not the fishing activities are relevant depends on the kind of boundary in question. If it is a territorial sea boundary delimitation, the fishing activity may fall under the concept of historic title which, in this sense, requires a departure from the median line.³²² But, if the question is a continental shelf boundary delimitation, it has no role to play. This is because coastal states only have jurisdiction over the sea bed and subsoil, and not over the water column. Finally, if the question is related to the EEZ the first impression is that fishing activities do constitute a relevant circumstance. This is because the coastal state in the EEZ has sovereign rights over, *inter alia*, fishing activity.³²³ Indeed, in the *Libya v. Malta Case*, Libya accepted Malta's argument that "the Maltese fishing activities might...have relevance to the EEZ of Malta."³²⁴

(b) **Arrangements:** These may include those for navigation aids, pollution control, security and other administration arrangements. Such activities have no role to

³²¹ The conduct of the parties may be understood from a number of sources. These are:

a) Formal sources which include: "international treaty, constitutional provision, executive decree, statute, or subordinate legislation."

b) Less formal sources which include: "unilateral declarations by governments or individual officials; official press releases; ministerial statements; archival materials; reports of lands and surveys departments; monographs, memorial, unofficial maps and charts." See Johnston, D.M., *The Theory and History of Ocean Boundary-Making*, McGill-Queen's University Press, Kingston and Montreal (1988), at pp.32 and 34. On subsequent practices in general, see McNair, *The Law of Treaties*, Oxford University Press, London (1961), at pp.424-9; Fitzmaurice, *op. cit.*, n.17, pp.386-7. For the effect of practices on the parties respective legal position, see *The Beagle Channel Arbitration*, 52 ILR, at p.198, para.129; Taha, F., *The International Legal Aspects of the Boundaries of the Sudan with Ethiopia and Kenya*, PhD. Dissertation, vol. 1, Jesus College, Cambridge University (1973), at pp.44-172.

³²² See Chapter Two above for a dissection on the concept of historical title.

³²³ See Chapter One/ Section Four above.

³²⁴ Libyan Counter Memorial, *ICJ Pleadings: Libya v. Malta Case*, vol. II, at p.64, para.3.14. See also Evans, *op. cit.*, n.253, at pp.210-1.

play in the delimitation process as relevant circumstances. Any other view would obstruct the making of such arrangements in the area which is not yet delimited.³²⁵

(2) A unilateral claim

A unilateral claim by a state to a particular line as the boundary line with an other state cannot be taken as a relevant factor by a third-party settlement. The Court in the *Tunisia v. Libya Case*, for example, rejected the Tunisian claim of the Zénith Vertical 45° from Ras Ajdir as its boundary line with Libya.³²⁶ This was because the said line was established by unilateral action,³²⁷ and it was “originally intended only as the limit of an area of surveillance in the context of specific fishery regulation.”³²⁸ Hence, it was unable to accept the Tunisian claim and regard it as “opposable to Libya even as a mere inchoate maritime boundary.”³²⁹

(3) The demonstration of *de facto* agreements between the parties

Here a distinction needs to be made between

(a) A *de facto* agreement accepting an applicable method

If the conduct of the parties provides evidence of acceptance of a specific method for the delimitation between them in the area involved, the conduct of the parties, in this case, constitutes a relevant circumstance, which should be taken into account in the delimitation process.³³⁰ However, it does not follow that either party could be under a legal obligation by virtue of this acceptance in regard to its

³²⁵ *Gulf of Maine Case*, at para.237. This is because the acceptance of these arrangements as relevant circumstances would result in a situation where one party could attempt to construct and exercise some administrative simply to strengthen its legal position. *vis-à-vis* neighbouring states, in claiming a title over the disputed area. The natural reaction of a neighbouring state would be to challenge this ambition by preventing the state in question from exercising such activities. This would, most likely, result in a hostile relationship between the countries concerned.

³²⁶ *Tunisia v. Libya Case*, at paras.88-90. See also above at p.93, note 12.

³²⁷ For general discussion on different kind of unilateral acts, see *Oppenheim's, op. cit.*, n.52, at pp.1187-96.

³²⁸ *Tunisia v. Libya Case*, at para.90.

³²⁹ *Ibid.* A similar view was held by the Tribunal in the *Guinea/Guinea-Bissau Award*, at para. 94. See also Brown, *op. cit.*, n.4, at p.151.

³³⁰ *Greenland v. Jan Mayen Case*, at para.82; *Tunisia v. Libya Case*, at paras.117-21; *Gulf of Maine Case*, at paras.152-4, and *Libya v. Malta Case*, at paras.24-5.

relationships with a third state or in respect of a different area.³³¹ This limitation upon the effect of the conduct of the parties is necessary, because adopting a different approach would result in a situation where “a state which had to negotiate maritime boundaries with two or more neighbouring states would be inhibited in its negotiations with one neighbour lest it give hostages to fortune in its negotiations with other neighbouring states.”³³²

(b) A de facto agreement accepting a boundary line

The conduct of the parties may demonstrate respect for an appropriate line as the boundary line for some sovereign activities. The Court in the *Tunisia v. Libya Case*, for instance, found that each party, unilaterally, had bound its petroleum concessions to the 26° line, although their actual claims were beyond this line. The Court, in regard to this unilateral practice by both parties, stated that:

The result was the appearance on the map of a *de facto* line dividing concession areas which were the subject of active claims, in the sense that exploration activities were authorized by one Party, without interference, or (until 1976) protests, by the other.³³³

Strictly speaking, the Court in this case accepted this *de facto* boundary line between the petroleum concessions of the parties as a relevant circumstance in the delimitation of the continental shelf boundary between Tunisia and Libya. However, the said line, in the Court’s view, did not act *per se* as a tacit agreement between the parties, since their respective claims showed that they were never in agreement on that line. Rather it acted as evidence to indicate that the line “which

³³¹ The Court in the *Greenland and Jan Mayen Case* stressed this limitation by saying that: “the court would observe that there can be no legal obligation for a party to a dispute to transpose, for the settlement of that dispute, a particular solution previously adopted by it in a different context.” See para.85 of the decision.

³³² Churchill, *op. cit.*, n.163, at p.24.

³³³ *Tunisia v. Libya Case*, at para.117. It should be noted here that there is no agreement about the length of time over which the conduct of the parties should be extended in order to be relevant. The Court in the *Tunisia v. Libya Case* was satisfied with the practice of the parties from 1966 to 1974 in regard to Tunisia, and from 1968 to 1974 in regard to Libya. By way of contrast, the Chamber in the *Gulf of Main Case* considered the practice of Canada from 1965 to 1972 (for seven years) as a short period too brief to have any legal effect. *Tunisia v. Libya Case*, at para.117, and *Gulf of Maine Case*, at para.151.

the parties themselves may have considered equitable or acted upon as such—if only as an interim solution affecting part of the area to be delimited.”³³⁴

Natural resources

Natural resources (or the unity of deposit) are “the essential objective envisaged by States when they put forward claims to sea-bed areas containing them.”³³⁵ Therefore they have played a significant role in determining the bearing of the boundary line in delimitation by agreement. The practices of the Arabian Gulf States could provide practical examples in this regard.³³⁶ However, as far as third-party settlement is concerned, the role of economic factors is less certain.

In the *Grisbadarna Arbitration* the Permanent Court of Arbitration accepted the natural resources in Grisbadarna bank to be a relevant circumstance requiring the adjustment of the boundary line.³³⁷ The ICJ in the *North Sea Cases* accepted the unity of deposits as a relevant circumstance in the question of continental shelf delimitation.³³⁸ Similar support for this position is found in, *inter alia*, the

³³⁴ *Tunisia v. Libya Case*, at para.118. The acquiescence, either tacit or expressed, of one state over a particular issue, may give other state the rights to invoke the estoppel doctrine against the accepting state, if its claims are contrary to what it had already acknowledged. For further discussion on estoppel, see the World Court Judgement in the *Land, Island and Maritime Frontier Dispute Case (El Salvador v. Honduras) Application by Nicaragua Intervene*, at p.118, para. 63; Switzerland Federal Tribunal decision in the *Canton of Valais v. Canton of Tessin Case*, 75 ILR, at pp.114-21. *Oppenheim's, op. cit.*, n.52, at p.527; MacGibbon, I.C., “Estoppel in International Law,” 7 *ICLQ* (1958), at pp.468-513; Thirlway, H., “The Law and Procedures of the International Court of Justice 1960-1989, Part One,” 60 *BYBIL* (1989), at pp.29-48; Taha, *op. cit.*, n.321 at pp.119-44.

³³⁵ *Libya v. Malta Case*, at para. 50; *Gulf of Maine Case*, at paras.48 and 232. See also Bowett, D., “The Economic Factor in Maritime Delimitation,” *International Law at the Time of its Codification*, Essay in Honour of Roberto Ago. vol. 2. Milano-Dott. A. Giuffrè Editore (1987), at p.45.

³³⁶ See, for example. Saudi Arabia-Bahrain’s agreement of 1958, and Qatar-Abu-Dhabi’s agreement of 1969. For further details on the effect of natural resources in boundary delimitation on state practice in general and in the UAE’s in particular, see Chapter Four at pp.168-70.

³³⁷ See Chapter Two for more detail about the *Grisbadarna Arbitration*.

³³⁸ Para. 97. It should be noted that the Court in this case was not charged with drawing an actual boundary line between the parties. Moreover, Judge Ammoun in his separate opinion in the *North Sea Cases* denied the relevance of natural resources to the continental shelf delimitation, and argued that: “if the preservation of the unity of deposit is a matter of concern to the Parties they must provide for this by a voluntary agreement.” Judge Ammoun’s separate opinion, at p.149, para.53.

Tunisia v. Libya Case,³³⁹ the *Libya v. Malta Case*,³⁴⁰ and the *Greenland v. Jan Mayen Case*.³⁴¹

However, this was not true in the *Gulf of Maine Case*. The Chamber in this instance rejected the potential resources in the Gulf of Maine as a criterion to be applied in the delimitation process. Nonetheless, it does not follow that the Chamber overlooked the potential resources *in toto*. Rather it viewed these resources as relevant “in assessing the equitable character of the result.”³⁴² In 1992 the Tribunal in the *France/Canada Award* upheld the view of the Chamber in the *Gulf of Maine Case* regarding the question of natural resources.³⁴³

The difference between the two directions is that the former takes the view that natural resources are relevant circumstances similar to other acceptable circumstances, e.g. geographical configuration, to be taken into account in the early stage of the delimitation process. However, in the case of the latter the natural resources were seen as a criterion, amongst others, to be taken into account in the final stage of the delimitation process, in order to ensure the equitable character of the result.

So much for the third-party settlement stand in respect to the natural resources. Now we must examine the position of some international writers on this matter. Professor Mouton in his Hague Lectures in 1954 enumerated the existence of common deposits as a special circumstance that, like the exceptional configuration of the coasts, the presence of islands or navigable channels, necessitated a departure from the principle of equidistance. However, he asserted that the problem of common deposits is one which we “can only solve by

³³⁹ Para.107.

³⁴⁰ Para.50.

³⁴¹ The ICJ in this case took account of the fishing resources in the area, and therefore adjusted the median line to give equal access to fishing resources in the area of overlapping claim. *Greenland v. Jan Mayen Case*, at paras.72-76 and 92. Churchill criticized the court decision in “attaching too much significance to fishery resources as a relevant factor.” See Churchill, *op. cit.*, n.163, at p.22. See also the remark of Judge Oda in his separate opinion in this Case, at pp.115-7, paras.94-100, and that of Judge Schwebel in his separate opinion in the case, at p.120, and finally see Charney, *op. cit.*, n.41, at pp.236-40.

³⁴² *Gulf of Maine Case*, at para. 232.

³⁴³ *France/Canada Award*, at paras.83-5. See also Weil’s dissenting opinion in the *France/Canada Award*, at p.1211, para. 34.

agreement and for which it would be difficult to lay down a general rule.”³⁴⁴ Brown and O’Connell held that natural resources should not be invoked to justify a departure from the equidistance line, except in the case where a state established historical rights over the area where these resources are located. Otherwise the states concerned should solve their differences over these resources through bilateral negotiations.³⁴⁵

Churchill quite recently stated a similar view in general to Brown and O’Connell, but in addition he claimed that:

The present trends in the case law suggest that, when determining maritime boundaries, international courts and tribunals are likely to take very little, if any, account of fisheries factors when determining a continental shelf or a single continental shelf and EFZ/EEZ boundary, though possibly somewhat more account may be taken when determining a territorial sea boundary. Even when fisheries questions are taken into account, it is impossible to say what influence they will have on the drawing of a boundary line. This will depend on all the other circumstances of the case and what weight a court or tribunal attaches to other relevant factors.³⁴⁶

In conclusion it is hard to accept that the presence of natural resources, on its own, can be used *articulately* in international adjudication to justify the departure from the equidistance line.³⁴⁷ Their role should be limited to the course of negotiation between the states concerned.³⁴⁸ This argument can be supported by the following factors:

1. The adjustment of the boundary line in the *Grisbadarna Arbitration* was based on the historical factor of Swedish fishermen long utilizing the fishing bank, and not on the existence of fishing in itself.³⁴⁹
2. In the Commentary of the ILC Report of 1953 the presence of natural resources was not specified as being a special circumstance.³⁵⁰ Indeed Mr. François, the

³⁴⁴ Mouton, M.W., “The Continental Shelf,” 85 *Académie De Droit International* (1954-I), at p.420.

³⁴⁵ Brown, *op. cit.*, n.4, at p.80. See also Brown, *op. cit.*, n.12, at p. 44; O’Connell, *op. cit.*, n.19, at p.711.

³⁴⁶ Churchill, R.R., “Fisheries Issues in Maritime Delimitation,” 17 *Marine Policy* (1993), at p.53.

³⁴⁷ Weil, *op. cit.*, n.23, at p.264. See also Judge Gros, *op. cit.*, n.24, at p.385 para.40. An opposite view was stressed by Kwiatkowska, B., “Economic and Environmental Considerations,” *International Maritime Boundaries*, vol.1, Charney and Alexander (eds.), Martinus Nijhoff Publishers, the Netherlands (1993), at pp. 107-10.

³⁴⁸ Weil, *op. cit.*, n.23, at p.263.

³⁴⁹ See Chapter Two above.

³⁵⁰ *ILC Yearbook* (1956), vol. 2, at p.300, para.37.

Rapporteur, in answering an argument put forward by Mr. Zourek that the rules of continental shelf should be linked with the rules of territorial sea delimitation, stated, *inter alia*, that the actual method for the territorial sea delimitation “might be affected by certain consideration, particularly, as regards navigation’s and fishing interests, which would not apply in the case of continental shelf.”³⁵¹

3. The Court in the *North Sea Cases* enumerated the unity of deposits as a relevant circumstance, that is, one to be taken into account in the course of negotiations.³⁵²
4. Although the Court in the *Tunisia v. Libya Case* accepted that “the presence of oil-wells in an area to be delimited,...may, depending on the facts, be an element to be taken into account in the process of weighing all relevant factors to achieve an equitable result”,³⁵³ it relied entirely on the *de facto* boundary line between Libyan and Tunisian oil concessions, and the geographical factors of the area, to reach an equitable solution. Similarly, the Court in the *Libya v. Malta Case* accepted natural resources as constituting relevant circumstances, albeit declining to take them into account in the case. This was because the parties had not furnished the Court with any indications at the natural resources of the area concerned.³⁵⁴

To sum up, for a factor to be relevant in continental shelf delimitation, it should have a role to play in the legal title to the shelf area.³⁵⁵ Since the issue of mineral deposit has exercised no such role,³⁵⁶ why then should it have any role in the delimitation process?³⁵⁷ Moreover, the fact that natural resources are

³⁵¹ *ILC Yearbook* (1953), vol. I, at p.134, para.53.

³⁵² See also Bowett, *op. cit.*, n.335, at pp.49-50.

³⁵³ *Tunisia v. Libya Case*, at para.107.

³⁵⁴ Para.50. In fact the court did not appear to be certain about accepting these factors as a relevant circumstance. The Court said that natural resources “*might* well constitute relevant circumstances.” See para.50.

³⁵⁵ *Libya v. Malta Case*, at para. 46.

³⁵⁶ A state is entitled to sovereign rights over the continental shelf area by virtue of its sovereignty over the coastal front. See *Ibid.*, at para. 49.

³⁵⁷ A consideration based on natural resources contains a consideration of a political and economic character. Third-party settlement should not take into account such consideration, in the early stage of the delimitation process, except where the parties asked for a decision *ex aequo et bono*. *Gulf of Maine Case*, at para.59. See also Brown’s comments on the Court judgement.

changeable factors, in the sense that “a particular resource which is of a great worth today may have no economic value tomorrow, and vice versa,”³⁵⁸ could lead to the conclusion that “it would be neither just nor equitable to base a delimitation on the evaluation of data which changes in relation to factors that are sometimes uncertain.”³⁵⁹

Economic and socio-economic factors

Economic and socio-economic factors and the needs of states to develop or to preserve their economic livelihood have been advanced before third-party settlement in almost all the cases. This has been especially so when the parties were underdeveloped, e.g. Guinea and Guinea-Bissau; or in instances where one of them was significantly less wealthy than the other, e.g. Malta and Libya.

By economic and socio-economic factors, we mean the economic dependence of the parties for their livelihood on the natural resources in the area concerned, as with fishing.³⁶⁰ Also included would be such factors as the difference in size of population between the parties in the area, their comparative wealth, and their need for economic development.³⁶¹ These economic factors have an obvious connection with the issue of the unity of deposit examined above. However, it is possible to make a distinction between them. The former are the needs of the people of the parties, and the dependence for their livelihood on the natural resources (fishery activity in most cases), which are located in the area of the delimitation. Moreover, in some cases one of the parties is less wealthy than the other. This difference between the two states might be alleged by the less rich state as a factor to be taken into account. Thus “the area of continental shelf regarded as appertaining to the less rich of the two states would be somewhat

Brown, *op. cit.*, n.4, at p.233. For further discussion on a decision *ex aequo et bono*, see Chapter Seven.

³⁵⁸ Weil’s dissenting opinion in the *France/Canada Award*, at p.1211, para.34. *cf.* Bowett, *op. cit.*, n.335, at p.60.

³⁵⁹ *Guinea/Guinea-Bissau Award*, at para.122. For a different view, see Judge Weeramantry, *op. cit.*, n.24, at pp.267-8, para.211.

³⁶⁰ Kwiatkowska, *op. cit.*, n.347, at pp.78-9. Weil, *op. cit.*, n.23, at pp.262-3. Evans, *op. cit.*, n.253, at p.188.

³⁶¹ Judge Oda, *op. cit.*, n.297, at p.159, para.66.

increased in order to compensate for its inferiority in economic resources.”³⁶² However, in the case of the unity of deposits, the matter is centred on the potential natural resources themselves, like an oil field or fishery bank, and whether, as we have seen, it is justifiable to shift the boundary line to take account of these resources.

Economic and socio-economic factors in this sense have been definitively rejected as having any relevant role to play in selecting the method of delimitation, or in generating a boundary line. The Court in the *Tunisia v. Libya Case* stated, “that economic considerations cannot be taken into account for the delimitation of the continental shelf areas appertaining to each Party. They are virtually extraneous factors since they are variables which unpredictable national fortune or calamity, as the case may be, might at any time cause to tilt the scale one way or the other. A country might be poor today and become rich tomorrow as a result of an event such as the discovery of a valuable economic resource.”³⁶³ A similar position has been adopted in a number of other international judicial and arbitral decisions.³⁶⁴

To sum up, it is true that a third-party settlement applying law has no role in distributing justice, or “the task of establishing a regime of equitable” share,³⁶⁵ nor has it a role in giving one party preference because it has fewer resources than the other. The role of the third-party settlement in the delimitation process is to draw a boundary line in an area where there is an overlapping of legal claims. It is also true, on the other hand, that the third-party settlement should not increase the hardship or the poverty of either party. Therefore it is necessary to verify that the result of the delimitation is not radically inequitable, that is to say “as likely to entail catastrophic repercussions for the livelihood and economic well-being of

³⁶² *Libya v. Malta Case*, at para 50.

³⁶³ *Tunisia v. Libya Case*, at para.107. A different view was stressed by Judge Weeramantry, *op. cit.*, n.24, at pp.267-8, para.211. See also Bowett, *op. cit.*, n.335, at pp. 61-2.

³⁶⁴ *Gulf of Maine Case*, at paras.59, 232 and 237; *Libya v. Malta Case*, at para.50; *Guinea/Guinea-Bissau Award*, at para.122; *Greenland v. Jan Mayen Case*, at para.80. Interestingly, Evans indicated the difficulty which would result if the economic and socio-economic factors were accepted as relevant circumstances. See Evans, *op. cit.*, n.253, at p.186. And See Charney, *op. cit.*, n. 41, at pp.236-40.

³⁶⁵ Bowett, *op. cit.*, n.335, at p.60.

the population of the countries concerned.”³⁶⁶ This concern is clearly influenced the World Court in the *Anglo-Norwegian Case*,³⁶⁷ and which subsequently had been reflected into Article 4(4) of the Territorial Sea and Contiguous Zone Convention of 1958, which reads:

Where the method of straight baselines is applicable...account may be taken, in determining particular baselines, of economic interests peculiar to the region concerned, the reality and the importance of which are clearly evidenced by a long usage.

Security interests

Security interests, as a relevant circumstance in maritime delimitation, means that the court or tribunal should avoid, as far as possible, drawing the boundary line too close to the shore of either party in a way which may threaten its national security or “imply an inequitable displacement of the possibility of [one party] to protect interests which require protection.”³⁶⁸ Within this context security interest have been accepted in international adjudication as having a limited role in the delimitation process. This role is to support and strengthen other factors and principles when deciding upon a result for the delimitation. In addition, security interests may be used in the assessment of the equitableness of the result.³⁶⁹ However, security interests could not on their own be a decisive influence, or suggest a boundary line.³⁷⁰ Security interests, finally, are distinguishable from defence arrangements which have been rejected as a relevant circumstance for determining the boundary line. The chamber in the *Gulf of Maine Case* held that: “the respective scale of activities connected with...defence...can not be taken into account as a relevant circumstance.”³⁷¹ It might be suggested that the idea behind the rejection of defence arrangements as a

³⁶⁶ *Gulf of Maine Case*, at para.237. See also Judge Weeramantry, *op. cit.*, n.24, at pp.267-70, paras.211-9. See also Weil, *op. cit.*, n.23, at p. 263.

³⁶⁷ *Anglo-Norwegian Case*, at p.133.

³⁶⁸ *Greenland v. Jan Mayen Case*, at para.81. To the same effect, see *Guinea/Guinea-Bissau Award*, at paras.92, 98 and 124; *Libya v. Malta Case*, at para.51. See also Churchill, *op. cit.*, n.163, at p.23.

³⁶⁹ Weil, *op. cit.*, n.23, at p.265.

³⁷⁰ *Anglo/French Award*, at para.188; *Tunisia v. Libya Case*, at para.51; *Guinea/Guinea-Bissau Award*, at para.124; *Greenland v. Jan Mayen Case*, at para. 81. See also Evans, *op. cit.*, n.253, at p.177-8.

³⁷¹ *Gulf of Maine Case*, at para. 237.

relevant circumstance is that the acceptance of these activities as relevant circumstances would encourage states to build such installations and arrangements to affect the delimitation of its boundary with its neighbouring states.

Conclusion

It seems right to conclude that, in the law of maritime boundary delimitation, states are under an obligation to enter into negotiations before they have recourse to any other formula to determine the boundary between them. This obligation should be undertaken in good faith with the intention of reaching an agreement. This can be done, as we shall see in Chapter Four, by working out an acceptable solution to a sensitive problem, such as the presence of an island or oil field. However, where no agreement can be concluded, the states concerned may invoke the rule of equidistance/special circumstances, which is enunciated in the 1958 Continental Shelf Convention. Where the Convention is not applicable they may apply the rule of equitable/relevant circumstances. Such rules, whether in customary law or in the convention based law, may be used as bases for negotiations between states concerned. Nevertheless, if they are still far from reaching an agreement, they may have recourse to some form of a third-party settlement to resolve the differences between them on the basis of international law or on the basis of the principle of *ex aequo et bono*.³⁷² As far as international law is concerned a third-party settlement would apply the rule of equidistance-special circumstances where Article 6 is applicable, or the rule of equitable-relevant circumstances where it is not applicable. It was submitted that there are no practical differences between these two rules, since they both seek to produce an equitable result for the delimitation.³⁷³

³⁷² For more discussion on this principle, see Chapter Seven.

³⁷³ Moreover, Professor Brown after examining the bilateral treaty practice of the states not party to the Geneva Convention, the agreement signed between 1969 and 1982, concluded that: "it remains true that, invariably, the boundary-making process can be regarded as compatible with, if not actually the application of, the three-point formula of Article 6 of the Geneva Convention. Equidistance remains the predominant principle of delimitation and departures from the equidistance line are based on the agreement of the parties—either as a matter of mutual acceptability or to accommodate some special circumstances." Brown, *op. cit.*, n.4, at p.215.

The notions of equity and equitable principles have been widely invoked by third-party settlement to justify a particular boundary line, or to disregard or reduce the effect of some special or relevant circumstances present in the area. Despite these wide uses judicial and arbitral settlements have not spent enough time elaborating on the notion of equity and how it works in the delimitation.³⁷⁴ Special circumstances and relevant circumstances have been used to indicate and to justify a particular boundary line as constituting an equitable result for the delimitation of a particular area. It has been suggested that the concept of relevant circumstances is wider both in scope and in role attached to them than is the concept of special circumstances. Certain factors, as noted, have been accepted, whereas other have been rejected, as constituting special or relevant circumstances. The presence of islands and the difference in the length of the coastlines of the parties are among the factors which have been consistently accepted as special or relevant circumstances. The exact weight and effect to be given, however, is far from been consistent. Moreover, the process of balancing up and evaluating these factors have never been fully explained. This attitude has caused the law of maritime boundary delimitation to be regarded as incomplete³⁷⁵ and unpredictable.³⁷⁶ These characteristics are likely to increase the differences between states in their interpretation of the rules of delimitation, and it is very likely that this would cause an expansion in states' recourse to international adjudication to solve their disagreements.³⁷⁷

³⁷⁴ Charney, *op. cit.*, n.84, at p.588. See also Judge Gros, *op. cit.*, n.24, at p.383, para 39; Judge Weeramantry, *op. cit.*, n.24, at pp.254-8, paras.156-65;

³⁷⁵ Weil, *op. cit.*, n.23, at p.14.

³⁷⁶ *Ibid.*, at p. 284. Regarding the predictability in maritime boundary delimitation, Sir Jennings stated that if the parties could predict the decision of the court, and nevertheless came to the court, then it would become clear that one of them at least had been badly advised. Sir Robert Jennings, "The Proper Role of International Adjudication," *Lecture in International Litigation and the Fragmentation of International Law, 10-11 May 1996*, University of Edinburgh. See also Jennings, *op. cit.*, n.73, at p.38. To the same effect, see Bowett, D. W., "The Arbitration between the United Kingdom and France Concerning the Continental Shelf in the English Channel and South-western Approaches," 49 *BYBIL* (1978), at p.14; Bilder, R.B., "International Dispute Settlement and the Role of Adjudication," *The International Court of Justice at a Crossroads*, Damrosch L.F. (ed.), Transnational Publishers, Inc. New York (1987), at p.167; Schachter, O., *International Law in Theory and Practice*, Martinus Nijhoff Publishers, the Netherlands (1991), at p.59.

³⁷⁷ Since 1969 at least fifteen cases have been referred to judicial settlement: These are North Sea Case (1969); Anglo-French Award (1977); Aegean Sea case (1978); Sharjah/Dubai Award (1981);

The adoption of the EEZ into the law of the sea, as far as the delimitation of the continental shelf is concerned, had two results:

1. An identical rule was adopted for the continental shelf and EEZ boundary delimitation. This rule, as we have seen, was subject to strong criticism by international scholars.
2. There began to be a tendency towards having a single boundary line for the continental shelf and the EEZ boundary. This single boundary line, although both desirable and logical, has not been established as a general rule in customary international law. Third-party settlement, therefore, should decline to draw a single boundary line without a prior joint request from the parties concerned.

Tunisia-Libya case (1982); Gulf of Maine Case (1984); Libya-Malta Case (1985); Guinea/Guinea Bissau Award (1985); Guinea Bissau/Senegal Award (1989); France/Canada Award of 1992; Gulf of Fonseca Case (1992); Jan Mayen Case of 1993; Qatar-Bahrain Case maritime delimitation case (Jurisdiction) (1995); Cameroon-Nigeria Case (Interim Measures) (1996). See also Bowett, *op. cit.*, n.376, at p.14; Charney, *op. cit.*, n.41, at p.227.

Delimitation of the Maritime Boundaries of the UAE

Delimitation of the Maritime Boundaries of the UAE

4

The World Court and international tribunals have de-emphasized the value of the equidistance method in Article 6, and placed a great emphasis on equitable principles to achieve an equitable result in the continental shelf delimitation. Relying on equitable principles gives the court or tribunal the necessary flexibility to adjust or exclude the equidistance method. In order to achieve such flexibility, Article 6 has been equated into customary law. It has been submitted that in effect Article 6 adopted, in the absence of agreement, a single rule of 'equidistance/special-circumstances'. This rule was said to be similar in effect to the rule of 'equitable/relevant-circumstances' under customary law. We will now examine more closely UAE practice on the delimitation of its maritime boundaries, internal and external. This will permit both the identification of the common elements of this practice, and the extent to which it accords with the norms of delimitation in international law identified above. Such an examination is necessary for our discussion in Chapter Five, where we compare the practice of UAE with that of Iran. This comparison will help us to determine the compatibility and the contrast between the Iranian and UAE positions regarding maritime boundary delimitation. The value of this is that it sheds light on the difficulty which prevents the two states from finalising the offshore boundaries between them. The UAE's practice can best be discussed in two sections: (1) The International Boundaries; (2) The Inter-Emirates' Boundaries.¹

¹ For the importance of the Inter-Emirates' Boundaries, see the introduction to Section Two below.

Section One

The UAE International Boundaries

The UAE is a federal state encircled by four neighbouring countries, Qatar, Saudi Arabia, Iran and Oman.² The Federal State has boundary agreements with three of these countries, namely Qatar, Iran and Saudi Arabia. Now we shall discuss each of these agreements in turn.

A: Qatar-UAE [Abu-Dhabi] Agreement of 1969

Qatar and Abu-Dhabi are two adjacent states sharing a concave coastline on the Arabian side of the Gulf. The parties, it will be recalled, were in dispute over the ownership of a group of islands.³ This dispute led the British Government, which was in a special treaty relationship with Abu-Dhabi and Qatar,⁴ to arrange in 1960, for two experts to act as 'referees'.⁵ Mr. Gault and Professor Anderson were thus appointed by the British Government, with the approval of the parties. Their mandate was to study the rival claims and to examine the evidence which the parties would present, either themselves or through lawyers.⁶ In April 1962 Gault and Anderson recommended that; the island of Halul⁷ belongs to Qatar and that several smaller islands to Abu-Dhabi.⁸ As the report of the work of Mr. Gault and Professor Anderson is not yet published, although more than thirty years have elapsed, it is difficult to determine whether their recommendations constituted conclusions of law or suggestions to the parties *ex aequo et bono*.

² For a discussion on the UAE's federal system, see the introduction to this work.

³ Including Halul, Das, Shirà'uh, Diyénah, 'Arzanah, Dalmà, Sir Bani Yàs, Ghàghah, al-Qaffày, al-Mihayyimàt, Makàsib and al-Ashàt. See *Arabian Boundary Dispute*, vol. 17, Archive editions, Schofield R. (ed.), Redwood Press Ltd., England (1992), at pp.634-9, 903-4 and pp.601-2.

⁴ For a discussion on this relationship, see the introduction to this work.

⁵ See a letter from the British Residents in Bahrain to the Rulers of Qatar and Abu-Dhabi dated 21 December 1960, reprinted in *Arabian Boundary Dispute*, vol. 16, Archive editions, Schofield R. (ed.), Redwood Press Ltd., England (1992), at pp. 879-99.

⁶ Qatar was represented, according to Sir Norman Anderson, by lawyers from Egypt, but Abu-Dhabi was not. Sir Norman Anderson's letter to the writer, 10 February 1994.

⁷ The largest of the disputed islands, lying 55 miles off the Qatari mainland and 106 off the Abu-Dhabi mainland.

⁸ Their findings have been endorsed by the British Government. See the *Daily Telegraph*, 24 April (1962), at p.19.

A characterisation of the work of Mr. Gault and Professor Anderson

The Ruler of Qatar in his letter (6 December 1960) to the British Government suggested international arbitration to examine the dispute with Abu-Dhabi over the ownership of Halul island.⁹ The British Government declined to accept such a suggestion¹⁰ and proposed, as an alternative, the appointment of Gault and Anderson as experts to examine the dispute between the two Emirates.¹¹ It is interesting to consider what category of international dispute settlement the Gault-Anderson process represents. The starting point must be Article 33 of the Charter of the United Nations, where the methods of international dispute settlement are listed as follows: “negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.”

There are some similarities between Gault-Anderson’s work and the method of conciliation. The similarities are threefold, and can best be examined separately. However, it is of value to give a definition of conciliation before we go on to such an examination.¹² Article 1 of the Regulation on the Procedure of International Conciliation defined conciliation as:

A method for the settlement of international disputes of any nature according to which a Commission set up by the Parties, either on a permanent basis or an ad hoc basis to deal with a dispute, proceeds to the impartial examination of the dispute and attempts to define the terms of a settlement susceptible of being accepted by them or of affording the Parties, with a view to its settlement, such aid as they may have requested.¹³

⁹ See *Arabian Boundary Dispute, op. cit.*, n.5, at p. 896.

¹⁰ There were a number of reasons for this, which can be detected from letters that passed between officials in the British Government. The most notable one was that: Abu-Dhabi declined to sign a special agreement with Qatar to refer the Halul question to international arbitration. For other reasons, see Mr. A.C. Samuel’s note on the ownership of Halul island, 22 September 1955, reprinted in *Arabian Boundary Primary Documents 1853-1960*, vol.13, Archive Editions, Schofield and Blake (eds.), Redwood Press Ltd., England (1988), at p.342; Letters from Sir B.A.B. Burrows, The British Resident in the Persian Gulf in Bahrain, to Mr. L.A.C Fry, Eastern Department, Foreign Office. Dated 2 March 1955, and 3 May 1955. Reprinted in *Ibid.*, at p.333, para.9(a) and p.337; Foreign Office proposal for Halul island award, 22 June 22 1960. Reprinted in *Arabian Boundary Dispute, op. cit.*, n.5, at p.831.

¹¹ See *Arabian Boundary Dispute, op. cit.*, n.5, at p.896.

¹² For further discussion on conciliation, see Chapter Seven.

¹³ Quoted from Merrills, J.G., *International Dispute Settlement*, 2nd ed, Grotius Publications Ltd, Cambridge (1993), at p.59.

The similarities between the work of Gault and Anderson and conciliation

(1) In terms of being binding upon the parties

The opinion of conciliators is not binding upon the parties, since their task is to give a recommendation or opinion that is susceptible of being accepted by the parties. This was true in respect of the Gault-Anderson commission. The British Political Resident in Bahrain, in his letter to the Ruler of Qatar dated 21 December 1960, said that:

on the conclusion of their visit Mr. Gault and Professor Anderson would give an opinion on the basis of which Her Majesty's Government and Your Highness and the Ruler of Abu-Dhabi would seek to arrive at an acceptable solution to the problem.¹⁴

(2) In terms of the function of a conciliation commission

Conciliation commissions in general have two common functions: namely "to investigate the dispute and to suggest the terms of a possible settlement."¹⁵ Again this exactly matches the task of the Gault-Anderson commission. In the letter of the British Political Resident, mentioned above, this task was outlined as follows:

it is the intention that Mr. Gault and Professor Anderson should visit Your Highness and the Ruler of Abu-Dhabi in order to hear your views and those of Shaikh Shakbut on the subject of Halul, and to take note of and examine all the evidence, historical, legal or customary, which Your Highness and Shaikh Shakbut may wish to put forward. On the conclusion of their visit Mr. Gault and Professor Anderson would give an opinion.¹⁶

(3) In terms of conciliation commission membership

According to Merrills a conciliation commission "has usually been made up of lawyers, though diplomats,...and individuals with technical expertise have also been employed."¹⁷ The Gault and Anderson Commission consisted of two British experts, Mr. Gault, former British Political Resident in Bahrain, and Professor Anderson, Professor of Islamic Law at the University of London.¹⁸

¹⁴ An identical letter was sent to the Ruler of Abu-Dhabi on the same date. See *Arabian Boundary Dispute*, *op. cit.*, n.5, at p. 898 and p.900.

¹⁵ Merrills, *op. cit.*, n. 13, at p. 67.

¹⁶ See *Arabian Boundary Dispute*, *op. cit.*, n.5, at p.898 and p.900.

¹⁷ Merrills, *op. cit.*, n.13, at p.69.

¹⁸ See *Arabian Boundary Dispute*, *op. cit.*, n.5, at p. 898 and p.900.

To sum up, the Gault-Anderson Committee, although it had not been given entirely clear definition by the British government, had the form, the task, and the character of conciliation.

Conclusion of the 1969 Agreement

Abu-Dhabi and Qatar accepted the recommendation of Gault and Anderson and concluded on this basis an agreement in 1969 to determine the boundaries of their respective continental shelves.¹⁹ The relevant articles in the said agreement will now be discussed. Articles 1 and 2 have designated the ownership of Abu-Dhabi over the island of Diyénah, and the ownership of Qatar over the islands of al-Ashât and Shirà‘uh. Article 3 consequently stressed that: “Neither country now has any territorial claim upon the other with respect to the islands or offshore areas falling outside its agreed offshore boundary.”

Article 4 described the continental shelf boundary as a straight line, except for a 3-nautical-mile arc around the island of Diyénah, extending for 115 nautical miles. There are four connected points (A,B,C,D). Point A is the tri-section point which is equidistant from the mainland of Iran, Qatar and Abu-Dhabi. This point is binding upon the Iranian side by virtue of their agreement of 1969 with Qatar.²⁰ Point A on the Qatar-Abu-Dhabi boundary line is the terminal point on the Qatar-Iran continental shelf boundary line. Moreover, this point could be the originating point of a possible boundary line between Iran and Abu-Dhabi.²¹ Point B, which is 35 nautical miles from point A, was selected to coincide with the location of the al-Bunduq oil field. Point C is the intersection of line B-D, and, like point B, not an equidistant point. The distance between points B and C is 35 nautical miles. The boundary line between Abu-Dhabi and Qatar terminates at point D which “is situated at the intersection of the Parties’ 3-nautical-mile territorial sea

¹⁹ For the text of the agreement, see US. Department of Series, *Limits in the Seas*, Series A, No.18.

²⁰ Article 1 of the Qatar-Iran agreement defined point 6, the terminal point, as the point located at 25° 31' 50" Latitude N. and 53° 02' 05" Longitude E. Point A in Qatar-Abu-Dhabi was located at the same geographical location. For the text of the agreement, see *International Maritime Boundaries*, Charney and Alexander (eds.), Martinus Nijhoff Publishers, the Netherlands (1993), at p.1516.

²¹ For further discussion, see Chapter Five.

limit, and is therefore also an equidistance Point.”²² Point D, finally, is situated 45 nautical miles from point C.²³ Thus the two parties still needed to determine the boundary line between their respective territorial sea limits. As we shall see, however, this became impossible after the conclusion of the UAE-Saudi Arabia Agreement of 1974.²⁴

Besides its importance in determining the continental shelf boundary line and in resolving the question about the sovereignty of certain islands in the Gulf, the Abu-Dhabi-Qatar Agreement of 1969 had two significant additional elements: (1) Its treatment of Diyénah island; (2) Its treatment of cross-boundary resources. We shall now examine these two elements more closely.

(1) The treatment of Diyénah island in the delimitation

The Abu-Dhabi island of Diyénah lies in the equidistance zone between Abu-Dhabi and Qatar.²⁵ The parties decided to restrict the influence of Diyénah to a 3-nautical-mile territorial sea limit. The result was an arc in the boundary line around Deyinah island. The 3-nautical-mile limit was chosen because the parties, at the time of the conclusion of their agreement, were known to have the 3-nautical-mile limit for their territorial sea.²⁶ It is important to note that the extension of the UAE territorial sea to a 12-nautical-mile limit²⁷ would not effect

²² Article 4(3) of the Agreement reads:

“A straight line from point ‘C’ as defined above, to point ‘D’ at the mouth of the Khaur al-Ádid (Khor al Údayd) on the territorial waters’ boundary, with geographic coordinates. Latitude North 24° 38’ 20” and Longitude East 51° 28’ 05”.” The distance between the two parties’ respective land boundary and point ‘D’ is 3 nautical miles. See Charney and Alexander *op. cit.*, n.20, at p.1543.

²³ According to the US Department Geographer, point B is not precisely on the al-Bunduq oil well, but rather at a site of 0.5 nautical mile south-west. Similarly, point D was placed 2 nautical miles from the mainland. The discrepancy in the location of points B&D was referred to an inaccurate map for the area. See US. Department of Series, *Limits in the Seas*, Series A, No.18, at pp.2 and 3.

²⁴ See below in latter stage of this chapter.

²⁵ For further discussion on the effect of islands in boundary delimitation, see Chapter Six.

²⁶ See Qatar and Abu-Dhabi offshore concession agreements of 1952 and 1953 respectively, in which the territorial sea was limited to 3 nautical miles. For the text of the agreement, see *Arabian Boundary Dispute*, *op. cit.*, n. 5, at pp.793 and 797. See also Chapter One/Section One.

²⁷ For more discussion on the extension of the UAE territorial sea limit, see Chapter One/Section One.

the 3-nautical-mile limit around the UAE island of Diyénah.²⁸ This is because Article 147 of the UAE Constitution stressed that the establishment of the federation of the UAE, of which Abu-Dhabi is a member, had no impact upon pre-existing agreements which the member Emirates had concluded with other states or international organizations.²⁹ Therefore, the treaties of the component territories continue in force within territorial limits.

(2) Sharing cross-boundary hydrocarbon resources³⁰

The 1969 agreement resolved the question of ownership over the al-Bunduq oil field, which is situated between the parties. According to Article 6, “al-Bunduq field is to be equally shared by the parties.”³¹ Moreover, in order to simplify the operation at the oil field, the agreement stated that exploitation should be carried out by Abu-Dhabi Marine Areas Corporation.

It is worth mentioning here that the treatment of the al-Bunduq field in the Abu-Dhabi-Qatar agreement is not unique in dealing with the problem of natural resources. There were various ways in state practice for dealing with this question. The Abu-Dhabi-Qatar agreement to share the field equally was one possible solution. Another was to agree on a equal sharing of income, but with the field being under the sovereignty of one party, e.g. the Saudi Arabia-Bahrain agreement of 1958.³² A third was to create a joint development area between the

²⁸ “This may be thought merely to reflect the position resulting from the law of the treaties: however, it demonstrates the importance of concluding agreements at the right time” See Anderson, D.H., “Recent Boundary Agreement in the Southern North Sea,” 41 *ICLQ* (1992), at p.421.

²⁹ Article 147 reads: “Nothing in the application of this Constitution shall affect treaties or agreements concluded by member Emirates with states or international organisations unless such treaties or agreements are amended or abrogated by agreement between the parties concerned.”

³⁰ Sharing the ownership of resources or joint development has been defined as: “an agreement between two States to develop so as to share jointly in agreed proportions by inter-State co-operation and national measures the offshore oil and gas in a designated zone of the seabed and subsoil of the continental shelf to which both or either of the participating States are entitled in international law.” See *Joint Development of Offshore Oil and Gas: Model Agreement for States for Joint Development with Explanatory Commentary*, vol.I, the British Institute of International and Comparative Law, London (1989), at p.45.

³¹ Consequently, “all royalties, profits and other government fees...shall be equally divided between the Government of Qatar and Abu-Dhabi.” Article 7 of the Agreement. See also the work of British Institute, *Ibid.*, at p.56.

³² See Article 2(7). For the text of the agreement, see Charney and Alexander, *op. cit.*, n.20, at p.1495.

two states. The designated area is divided in two parts. Each state then exercises jurisdiction in the part that is opposite its maritime zone. The other state is entitled to participate in that part with a share of a certain percentage in any petroleum activities, e.g. the Norwegian-Icelandic agreement of 1981.³³ A fourth was to designate an area for provisional co-operation activities in relation to the exploration for and exploitation of petroleum resources; e.g. the Australia-Indonesia (Timor Gap) agreement of 1989.³⁴ These are among the models or possible solutions for addressing the problem of common deposits. State practice in addition can provide further examples in dealing with common deposits in the area of delimitation.³⁵

The Treatment of the al-Bunduq oil field and the Doctrine of Unity of Deposit

It might be argued that the doctrine of unity of deposit,³⁶ which was suggested in the decision of the *North Sea Cases*, was not fully observed in the Qatar-Abu-Dhabi agreement in dealing with al-Bunduq oil field. The two parties, as mentioned above, agreed on dividing the oil field equally between them. However, if the intention of introducing the doctrine of 'unity of deposit' was to avoid "the risk of prejudicial or wasteful exploitation by one or other of the States concerned,"³⁷ Abu-Dhabi and Qatar in their agreement were aware of this risk. That is why they agreed that one party only would carry out the exploitation of the oil field, albeit the profits would be distributed equally between them. Therefore the two parties have actually preserved the unity of the al-Bunduq oil field, in spite of the fact that they agreed to draw the boundary line through it.³⁸

³³ See Articles 5 and 6 in *Ibid.*, at p.1763.

³⁴ See Articles 2 and 32 in *Ibid.*, at p.1260 and pp.1275-6.

³⁵ O'Connell, *The International Law of the Sea*, vol. 2, Shearer (ed.), Clarendon Press, Oxford (1982), at p. 712.

³⁶ For further discussion, see Chapter Three.

³⁷ *North Sea Cases*, at para. 97.

³⁸ Lo Yoni, the Rapporteur of the ILA International Committee on the Exclusive Economic Zone, in this regard has stressed that: it is "through joint development agreements that the States have the possibility to preserve the unity of the exploitation of the deposit." Quoted from Kwiatkowska, B., "Economic and Environmental Considerations," *International Maritime Boundaries*, Charney and Alexander (eds.), Martinus Nijhoff Publishers, the Netherlands (1993) at p.90. See also the British Institution, *op. cit.*, n.30, at pp.33-5; Churchill, R.R., "Joint Development Zones: International Legal Issues," *Joint Development of Offshore Oil and Gas*,

The effect of the al-Bunduq oil field upon the boundary line

The presence of the oil field in the delimitation area had some influence on the boundary line, since the agreement contained some arrangement to share the ownership of the field.³⁹ The effect of the oil field on the boundary line takes the form of designating point B in the boundary line to coincide with the location of the al-Bunduq field.

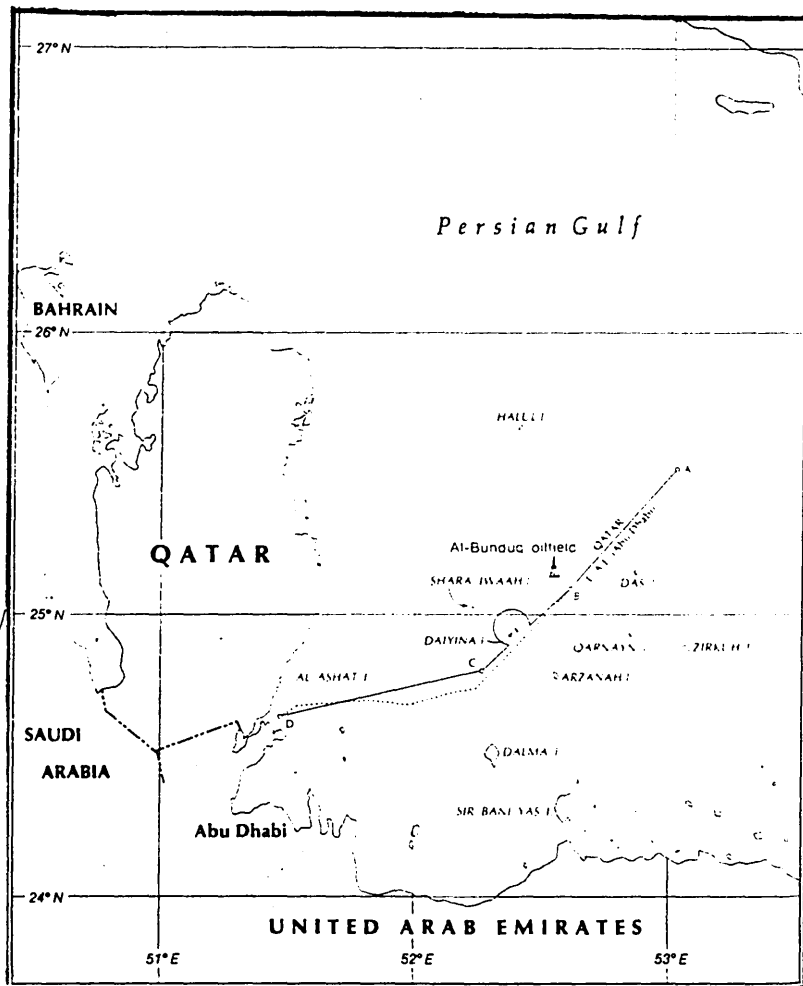


Figure: (10) Qatar-UAE boundary.
Source: *International Maritime Boundaries*, at p. 1546.

vol. 2, the British Institute of International and Comparative Law, Fox H. (ed.), London (1990), at pp.55-71, see in particular pp.61-2. See also *North Sea Case*, at para.99.

³⁹ This might suggest that the oil field has played a role in the process of negotiating the boundary line between Abu-Dhabi and Qatar. See also Kwiatkowska, *op. cit.*, n.38, at p.94.

B: Iran-United Arab Emirates Agreement of 1974

This agreement is sometimes cited as an agreement between Iran and Dubai,⁴⁰ despite the fact that the preamble to the Iran-UAE Agreement of 1974 stated that:

The Government of the State of UAE and the Imperial Government of Iran desirous of establishing in a just, equitable and precise manner the boundary line between the respective areas of continental shelf over which they have sovereign rights in accordance with international law.⁴¹

Interestingly, in the *Dubai/Sharjah Award*, Sharjah argued that “the agreement of 13 August between Iran and UAE was in reality an agreement between Iran and Dubai.”⁴² The Court of Arbitration did not comment on the Sharjah argument, and continued to refer to the 1974 Agreement as an agreement between Iran and UAE.⁴³

Having said that the 1974 Agreement should be considered as an agreement between the Federal authority of the UAE and Iran, it is important to stress that it only considered a part of the continental shelf between the two states; viz., that which is adjacent to the Dubai Emirate coastline.⁴⁴ This was because the dispute between Iran and the UAE about the sovereignty over three islands to the north-east of this area “had precluded the extension of the median line boundary... into the shelf area that might be affected by the islands.”⁴⁵ To the west it was unnecessary to proceed further, since the continental shelf boundary line between Iran and Abu-Dhabi had already been determined.⁴⁶

The agreed boundary is described in Article 1 as a line extending from the east to the north-east for a distance of 39.25 nautical miles. There are three turning and two terminal points (1,2,3,4,5) in the boundary line. The agreement

⁴⁰ See *Limit in the Seas*, Series, No.63. In which the agreement was cited as ‘Iran-United Arab Emirates (Dubai)’. Others’ publications cited the agreement as the ‘Iran-Dubai agreement’; see for example Bundy, R., “Maritime Delimitation in the Gulf,” *Territorial Foundations of the Gulf States*, Schofield R. (ed.), University of London, UCL Press, London (1994), at p. 183.

⁴¹ See *Limit in the Seas*, Series No.63.

⁴² *Dubai/Sharjah Award*, at p.668.

⁴³ *Ibid.*, see for example at pp.677-8.

⁴⁴ This may be the reason why the agreement was cited as an agreement between Iran and Dubai.

⁴⁵ *Dubai/Sharjah Award*, at p.665. See Chapter Six for full discussion on the effect of these Islands upon a possible boundary line between Iran and the UAE.

⁴⁶ Though the text of Abu-Dhabi-Iran continental shelf agreement has never been released to the public. For further discussion on Abu-Dhabi-Iran boundary, see Chapter Five.

did not specify a particular method. Nevertheless, the boundary line can be described as a median line, except in points 3 and 4 which follow the Sirri island's 12 nautical miles arc.⁴⁷

The significant elements in the Iran-UAE agreement

(1) *Sovereignty over the Sirri island*

The island of Sirri lies about 52 and 40 nautical miles from the UAE and Iranian coastlines respectively. Thus it lies on the Iranian side of the median line, but only 10 nautical miles from that line. It was inhabited by a permanent population most of whom were Arabs sharing language, traditional and tribal links with the Arabs in the Emirates.⁴⁸ Sirri island was subject to rival claims from Persia (Iran) and from the Emirate of Sharjah. In 1887 the Persian Government claimed the Island for the first time. Shortly afterwards, it occupied the Island by sending armed forces who removed the Sharjah flag and hoisted that of Persia.⁴⁹ The British Government's reaction was to "regard Sirri as belonging *de jure* to the Ruler of Sharjah but have tacitly acquiesced in its *de facto* occupation by Iran since 1887, though they have never formally admitted the Iranian claim."⁵⁰ The Government of Sharjah on the other hand expressed its opposition to the Iranian occupation. Iran thereafter retained its *de facto* control over the Island. In the 1974 agreement between Iran and UAE the island was taken into account by the parties and, in the delimitation, Sirri was given an arc of a 12-nautical-mile territorial sea limit between points 3 and 4. This resulted in an adjustment of the median line between the two countries of about 2 nautical miles towards the UAE coastline.

⁴⁷ See the map below.

⁴⁸ See *Arabian Boundary Primary Documents*, *op. cit.*, n.10, at p.157.

⁴⁹ See *Arabian Boundary Dispute*, *op. cit.*, n.5, at p.676, and *Arabian Boundary Primary Documents*, *op. cit.*, n.10, at pp.80-3.

⁵⁰ See *Annual Records of the Gulf*, United Arab Emirates, vol. 4, Archive Editions, Redwood Press Ltd., England (1992), at p.141.

(2) *Cross-boundary resources*

It has been seen how in the Qatar-Abu-Dhabi Agreement of 1969 the parties dealt with the existence of the al-Bunduq oil field. It will be recalled that point B in the Qatar-Abu-Dhabi boundary line was designated to coincide with the location of the oil field. The situation is differently addressed in the Iran-UAE agreement.⁵¹ The parties in this agreement contemplated the possibility of discovering an oil field across the boundary line, which they had agreed upon. Article 2 prohibited the parties from drilling on either side of the agreed boundary line for 125 metres from that line, “except by mutual agreement between the two governments.” Moreover, the parties shall “endeavour to reach agreement as to the manner in which the operations on the both side of the Boundary line could be co-ordinated or utilised.”⁵²

The legal status of Iran-United Arab Emirates unratified treaty

The UAE has not ratified its 1974 agreement with Iran,⁵³ though Iran did so in 1975.⁵⁴ There are two possible reasons why the UAE has refrained from so doing:

1. The dispute over the sovereignty of Abu Musa island, which lies just 14.54 nautical miles from point 5 on the agreed boundary line. Any decision regarding its ownership might possibly effect this boundary line.
2. UAE ratification of this agreement would mean that it would drop its historical claims to the ownership of Sirri island.

Nonetheless, the two parties have fully respected the boundary line that was set out in the said agreement. Three questions arise here: (1) is the need for ratification in this instance a matter of international law or domestic law? (2)

⁵¹ Since no oil field had been discovered in the median zone, which might have become subject to dispute over ownership between the parties.

⁵² It is worth mentioning here that Article 2 of the Iran-UAE agreement is similar to the other Iranian agreements with Qatar, Bahrain and Oman of 1969, 1971 and 1974 respectively. For more discussion, see Colson, D., “The Legal Regime of Maritime Boundary Agreements,” *International Maritime Boundaries*, Charney and Alexander (ed.), Martinus Nijhoff Publishers, the Netherlands (1993), at pp.54-6.

⁵³ On the effect, if any, of the delay in ratification a treaty, see *Oppenheim’s International Law*, 9th ed., vol. I, Peace, Jennings and Watts (eds.), Longman, London (1996), at p.1230.

⁵⁴ *Limit in the Seas*, Series No.94, (1981), at p.8.

what is the status of an unratified treaty? (3) what is the legal explanation for the UAE respecting the boundary line; although it has not ratified the agreement? We shall now discuss each of them in turn.

Starting with the first issue, it is permissible to say that ratification in the international sense is different from ratification in the constitutional sense. The former has been defined as “the international act...whereby a State establishes on the international plane its consent to be bound by a treaty.”⁵⁵ Whereas in the case of the latter, ratification—as a matter of domestic law—is considered “the internal constitutional act whereby some organ other than executive (usually the legislature), approves of, and authorizes, the treaty from the domestic constitutional point of view.”⁵⁶ If a treaty requires ratification as a matter of international law to be regarded in force between the parties, then logically either party would not be bound by the treaty before the ratification took place.⁵⁷

In the light of this distinction we shall now examine whether the requirement of ratification in the 1974 agreement between Iran and UAE was a matter of international law or domestic law.

Article 5 of the Iran-UAE agreement of 1974 reads:

- (a) This Agreement shall be ratified and the instruments of ratification shall be exchanged ...as soon as possible.
- (b) This Agreement shall enter into force on the date of the exchange of instruments of ratification.

According to this Article, two conditions must be fulfilled for the agreement to enter into force between the parties. These conditions are the ratification of the

⁵⁵ Quotation from Article 2(1)(b) of the Vienna Convention on the Law of Treaties. Ratification, nevertheless, is not the only way in which a state can express its consent to be bound by a treaty. Article 11 of the Vienna Convention on the Law of Treaties enumerated, in addition to ratification, the following means of consensus: signature, exchange of instruments constituting a treaty, acceptance, approval or accession, or by any other means if so agreed. However, the treaty or the attending circumstances would determine which of the above-mentioned means is required for a treaty to come into force between the parties. For more discussion on the requirement of ratification, see Blix, H., “The Requirement of Ratification,” 30 *BYBIL* (1953), at pp.357-80.

⁵⁶ Fitzmaurice, G., “Do Treaties Need Ratification?” 15 *BYBIL* (1934), at p.114. In addition, he asserted that this is an incorrect use of the term. Also see McNair, A., *The Law of Treaties*, Oxford Clarendon Press, Oxford (1961), at p.130; Sinclair, I., *The Vienna Convention on the Law of Treaties*, 2nd ed., Manchester University Press, Manchester (1984), at p. 41.

⁵⁷ Article 24 of the Vienna Convention on the Law of Treaty. See also Fitzmaurice, *Ibid.*, at p.129; Shaw, M., *International Law*, 3rd ed, Cambridge University Press, Cambridge (1991), at p. 577.

agreement and the exchange of the instruments of ratification. Ratification in this sense is a matter of international law; nonetheless, in accordance with Article 5 of the 1974 agreement, it cannot *per se* bring the agreement into force between the parties. This will take place only after the parties exchange the instruments of ratification. Therefore, the agreement under discussion has no mandatory status for the UAE since it is not formally in force. This is because the latter has not expressed its consent on the international plane to be bound by it. Such consent according to Article 5 of the agreement, must be expressed by the act of ratification. Hitherto the UAE has not taken this step. In addition, the UAE is required, according to its internal law, to ratify a treaty before it becomes constitutionally bound by it.⁵⁸

Notwithstanding this fact, the UAE, according to an informal source in the UAE government, is observing and respecting the boundary line that was determined in the 1974 agreement with Iran. This observance may be referred to the obligation not to defeat the object and purpose of the treaty, during the period between signature of a treaty and ratification, where a treaty requires ratification. The justification for this, as McNair wrote, is that states by putting their signature on a treaty requiring ratification ‘have...placed certain limitations upon their

⁵⁸ Ratification according to Articles 47(4) and 115 of the UAE Constitution is the only act whereby the UAE, constitutionally, can establish its consent to be bound by a treaty. To avoid any embarrassment, the UAE should not express its consent in a different way to be bound by a treaty on the international plane. Otherwise, this consent would cause a violation of a rule in the Constitution. Moreover, it is interesting that within the UAE, we can distinguish between the case where a treaty requires a necessary legislative measure to enable the treaty to be carried out, and the ratification of the treaty as a matter of internal law. (The two legal measures are distinct, though in practice they are passed by the same legislative body and often at the same time.) We mean by the latter the act whereby the UAE expresses its consent, in accordance with the UAE constitution, to be bound by a treaty. However, we mean by the former the necessary legislative measure, the act whereby the treaty is implemented within the UAE territory. Therefore treaty or treaties have no direct “statute-like” application in the UAE. The legislature may enact laws that incorporate (transform) treaties or treaty norms into domestic law. Article 125 of the Constitution reads: “The Governments of the Emirates shall undertake the appropriate measures to implement the laws promulgated by the Union and the treaties and international agreements concluded by the Union, including the promulgation of the local laws, regulations, decisions and orders necessary for such implementation.” For further discussion on the UAE constitution requirement to be bound on and within the UAE, see the House of Lords’ decision on 21 February 1991 on *Arab Monetary Fund v. Hashim and others Case*, 85 ILR, at p.5.

freedom of action during the period which precedes its entry into force.”⁵⁹ This obligation, which has embodied in Article 18 of the Vienna Convention, has been considered as constituting a progressively developing rule,⁶⁰ and so it is only binding on the parties to the Convention. The UAE has not yet become a party to the Vienna Convention on the Law of Treaties. Hence, it is not bound by the obligation of Article 18. Therefore, we could hardly refer to the UAE’s observance of the boundary line as its compliance with the requirement of Article 18 in this regard.

An alternative explanation for the UAE’s observance at the boundary line in question may be the creation of a new obligation between the two states. Indeed, if the practice of Iran and the UAE proved a common respect for a particular boundary line, this might be evidence of the creation of a new *de facto* agreement between the two states. Their mutual practices would be the main source of this new agreement. This argument can be supported by the judgement of the World Court in the *Tunisia v. Libya Case*. The Court in this case, as mentioned in Chapter Three, accepted the unilateral practice of the two parties in binding their petroleum concessions to the 26° line, as constituting a *de facto* boundary line between their respective continental shelf boundaries.⁶¹

However, it does not follow that the new *de facto* agreement between Iran and the UAE, which may be created by their practices, would cause the actual unratified agreement of 1974 to be regarded as in force between them. Rather it would mean that a new agreement has been created to respect a particular line as the boundary line for their respective continental shelf boundaries. Hence the 1974 agreement is still not in force between Iran and the UAE.

⁵⁹ McNair, *op. cit.*, n.56, at p.199; Fitzmaurice, G., *The Law and Procedure of the International Court of Justice 1947-59*, Cambridge University Press, Cambridge (1995), at pp.426-7.

⁶⁰ O’Connell, D.P., *International Law*, vol. I, 2nd ed., Stevens and Sons, London (1970), at pp.223-4; Sinclair, *op. cit.*, n.56, at p. 43; Shaw, *op. cit.*, n.57, at p. 561.

⁶¹ *Tunisia v. Libya Case*, at para.117. See also Paul Braveder-Coyle, “The Emerging Legal Principles and Equitable Criteria Governing the Delimitation of Maritime Boundaries Between States,” 19 *ODIL* (1988), at pp.175-7.

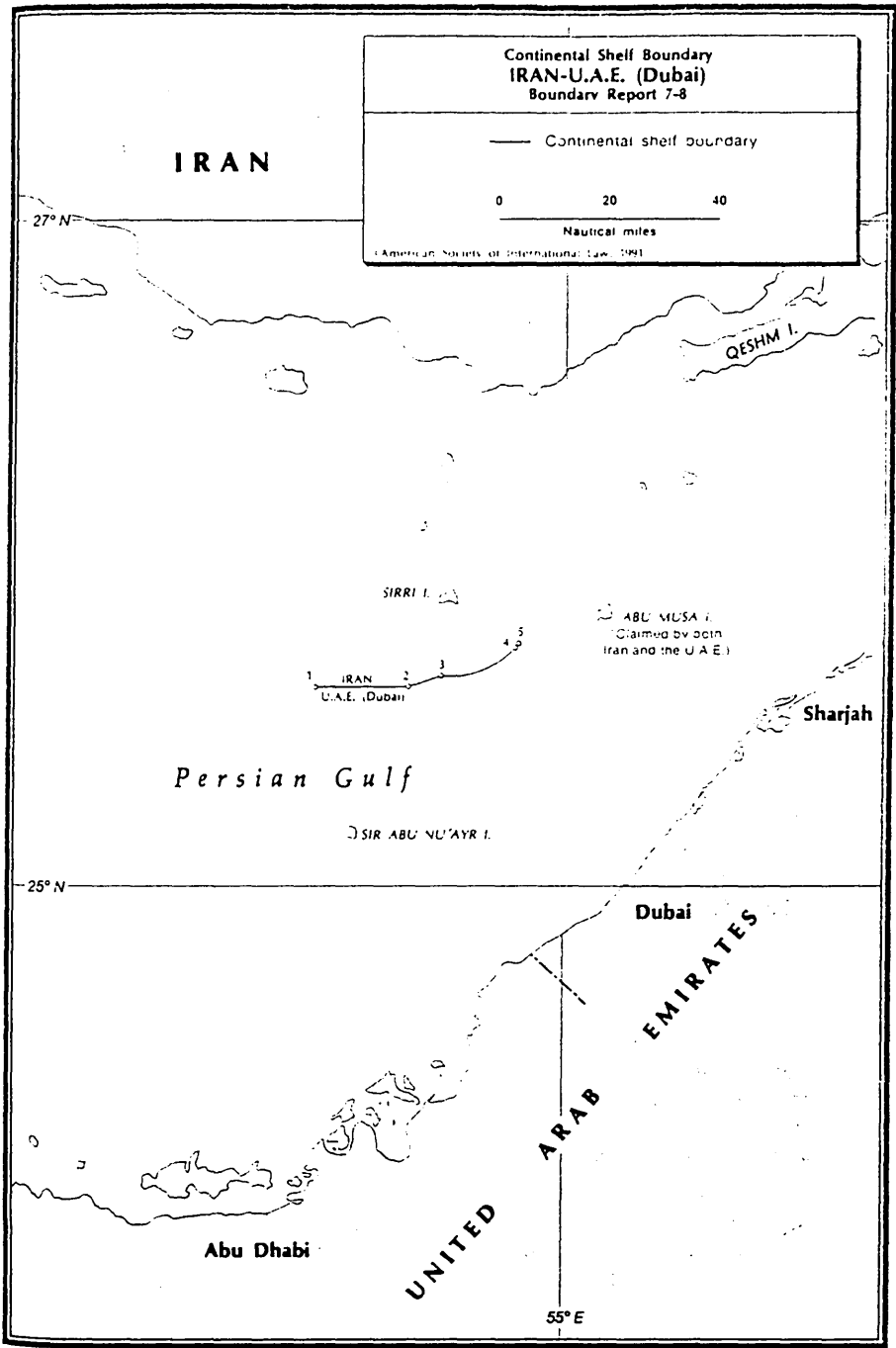


Figure: (11) Iran- UAE boundary.
Source: *International Maritime Boundaries*, at p. 1537.

C: United Arab Emirates-Saudi Arabia Boundary Agreement of 1974

The dispute over the boundary between the Kingdom of Saudi Arabia and the UAE dominated relations between the two countries for many years. This dispute, it will be recalled, centred, *inter alia*, on the Saudi demand: (a) to obtain access to the sea in the area of Khor al-Udayd; and (b) to be able to control the smuggling which, Saudi Arabia contended, was carried on from that area.⁶² These Saudi demands could not be met without the control of the area of Khor al-Udayd—an area offering a window on the Arabian Gulf coast between Abu-Dhabi and Qatar. The area of Khor al-Udayd was under the sovereignty of the Emirate of Abu-Dhabi. The British Government recognized Abu-Dhabi's sovereignty over the area in 1878.⁶³ In 1922 Ibn Saud, the King of Saudi Arabia, laid claim to sovereignty for the first time over the area.⁶⁴ This claim was, in turn, based on historical arguments and on tribal alliances.⁶⁵

⁶² Foreign Office Note no. E.411/150/91. 3 February 1938, at p. 5, reprinted in *op. cit.*, n. 3, at p. 255. See also Al-Ulama, H., *The Federal Boundaries of the United Arab Emirates*, Thesis submitted for the degree of Ph.D., Department of Geography, University of Durham (1994), at pp.179-81. The area of Khor al-Udayd was described, in terms of suitability for navigation, as follow: "The Khor itself is out of the question for steamers owing to its long, winding, narrow entrance (unless even if practicable vast dredging works were undertaken). Parts of the banks are low 'sabaknah' which flood at high tides or after heavy rain and parts are low sand hills. The heat from these hills is terrific. It is possible for steamers to anchor some distance off the mouth of the Khor... but the navigation to get there is very difficult (though I suppose that a passage could be buoyed, if it were a question of an oil terminal." See Foreign Office Paper no. C/1571.a/38. Dated 19 February 1937. See *Arabian Boundary Dispute*, *op. cit.*, n.3, at p.212.

⁶³ *Ibid.*, at p.258. Qatar challenged Abu-Dhabi sovereignty over the Khor al-Udayd area. The challenge resulted in some hostility between Qatar and Abu-Dhabi. The British Government nevertheless upheld its support for Abu-Dhabi. See Morsy, M.A., *The United Arab Emirates: A Modern History*, Hurtwood Press Limited, Silversted Westerham Hill, UK (1994), at pp.162-8.

⁶⁴ Summary of historical background to the dispute over the Khor al-Udayd area by D.M.H Riches. December 19, 1958. Reprinted in *Arabian Boundary Dispute*, *op. cit.*, n.3, at p.419. For more discussion, see Murad Nasrin A., *Territorial Disputes in the United Arab Emirates*, Thesis submitted for the degree of Ph.D., Department of Politics, University of Lancaster (1990), at pp. 164-95; Al-Ulama H., *op. cit.*, n.62, at pp. 156-185; Al-Alkim, H., *The Foreign Policy of the UAE*, Saqi Books, London (1989), at pp.107-36.

⁶⁵ Foreign Office Memorandum on Saudi claims, 30 June 1940, Foreign Office Paper no. E2203/2203/25. Reprinted in *Arabian Boundary Dispute*, *op. cit.*, n.3, at p.307. The British Government, representing Abu-Dhabi, resisted the claim of Ibn Saud. There were two reasons behind UK enthusiasm in opposing Ibn Saud's ambition over Khor al-Udayd. Firstly, the Khor could be used as a naval base in wartime. Secondly, the interest of the British Government was "to maintain unbroken the chain of British Protected States extending from Qatar to Muscat and thus to ensure that the coastal route which forms the only line of communication between the 'Trucial' coast and Qatar should nowhere pass through foreign territory." See *Arabian Boundary Dispute*, *op. cit.*, n.3, at p.256.

Saudi Arabia and the British Government, representing the Emirate of Abu-Dhabi, agreed to enter into negotiations in order to find an acceptable solution to the boundary dispute. Several rounds of 'Anglo-Saudi' negotiations took place between 1934⁶⁶ and 1938.⁶⁷ During World War II the boundary question remained in abeyance. However, negotiations resumed in 1949 and took place again in 1951 and 1952.⁶⁸ The two negotiating parties agreed in 1954 to refer the dispute to International Arbitration. A special agreement therefore was signed between them.⁶⁹ Unfortunately the Tribunal failed due to the fact that the Saudi member of the tribunal, Sheikh Yusuf Yasine, was representing the government of Saudi Arabia in the tribunal rather than acting as an impartial arbitrator.⁷⁰ The gap between the parties thereby remained wide with little chance of a bridge between them.

The Union authorities in the UAE took over from the British Government in dealing with the boundary question after the formulation of the UAE and the withdrawal of the British presence in the region in 1971. Saudi Arabia failed to recognize or have normal diplomatic relations with the Federation of the UAE until it solved the dispute over the boundary.⁷¹

⁶⁶ The first meeting was held between the negotiators of the parties in London on 24 June 1935. See Foreign Office Paper No. E 3944/77/1, reprinted in *Arabian Boundary Dispute*, *op. cit.*, n.3, at pp.190-274. For a summary of the relationship between Abu-Dhabi and the British government, see the Introduction to this work.

⁶⁷ Foreign Office Note on the south-eastern frontiers of Arabia, no. E/575/605/91, 2 February 1948, reprinted in *Arabian Boundary Dispute*, *op. cit.*, n.3, at p.328.

⁶⁸ See a note from British Embassy at Juddah to Saudi Arabia Ministry for Foreign Affairs. Foreign Office Paper no. E14598/1081/25 reprinted in *Arabian Boundary Disputes*, vol. 18, Archive editions, Schofield R. (ed.) (1992), at pp. 108-11. See also 'Anglo-Saudi' discussions on territorial issues, London, August, 1951, *Ibid.*, pp.645-60. Moreover, An 'Anglo-Saudi' Frontier Conference. Dammam between January 28-February 14, 1952. For the record of the Conference see Foreign Office Paper no. ES 1081/63, reprinted in *Ibid.*, pp.128-47.

⁶⁹ The Arbitration agreement between the Government of the United Kingdom (Acting on behalf of the Abu-Dhabi and the Sultan of Muscat and Oman) and the Government of Saudi Arabia was concluded in Jedda, on 30 July 1954. For the text of the agreement, see *Ibid.*, at pp.163-7.

⁷⁰ See Sir Reader Bullard, the British member of the tribunal, statement of resignation, 17 September 1955, reprinted in *Ibid.*, at pp.819-21. Additional example of Saudi unexpected behaviour was that "bribery and intimidation on a wide scale [had] taken place[from the Saudi Arabia employees] in the disputed area, with the result that it was no longer possible to estimate where the loyalties of the inhabitants lay." Sheikh Yusuf Yasine openly admitted before members of the tribunal the fact that he "himself was the Saudi Arabian official in charge" of these activities. See *Ibid.*, pp. 864, 819 and 822. See also Merrills, *op. cit.*, n.13, at p.99.

⁷¹ The representative of Saudi Arabia at the Arab League said, when the UAE registered for admission to membership, that his country had certain demands on the territory of the new State,

On 21 August 1974 an agreement was concluded between the UAE and Saudi Arabia to solve their boundary dispute.⁷² The parties bound themselves to the agreement by signature.⁷³ The text of the agreement remained secret until it was registered recently with the Secretariat of the United Nations, in accordance with Article 102 of the Charter of the United Nations.

The agreed land boundary line between the two States extends for about 270 miles, from point 'A' on the coast of the Arabian Gulf to where a possible tri-section point between the land boundaries of the UAE, Saudi Arabia and the Sultanate of Oman may be selected.⁷⁴ There are 14 connecting and turning points. On the Arabian coast, Saudi Arabia by this agreement gained a strip of land about 30 kilometres in width between Qatar and the UAE.⁷⁵ Saudi Arabia would consequently separate Qatar from the UAE, and Qatar as a peninsula would be cut off from any landward approach save through the territory of the Kingdom of Saudi Arabia.⁷⁶ In the Umm al-Zamul area, where a possible tri-section point between the UAE, Saudi Arabia and Oman may be designated, the UAE recognized the sovereignty of Saudi Arabia over three villages, located close to the boundary with Oman, by accepting the placing of these villages on the Saudi side of the boundary line.⁷⁷ The government of the UAE in 1975 notified the

which needed to be addressed before they could recognize it. See *The Political*, Kuwait daily newspaper 11 September (1974).

⁷² Interestingly, the two parties agreed on normal diplomatic relations immediately following the conclusion of the 1974 agreement. Riyadh radio said that "during the visit to Saudi Arabia by the UAE President the two Rulers had signed the final text of a border agreement; *and agreed to exchange diplomatic relations at ambassadorial level.*" Riyadh radio 11 GMT, 22 August (1974). See also a joint statement by the two parties, republished at Saudi daily newspaper *Albelad*, 22 August (1974). Moreover, the first Saudi Arabian ambassador to the UAE arrived on 29 May 1975. See *Gulf and the Arabian Peninsula Studies*, Quarterly Journal, Kuwait (1975), at p.239.

⁷³ Article 9 of the agreement. It is worth mentioning here that the method of entering into force specified for the 1974 agreement appears to be inconsistent with the UAE Constitution. This specifies the necessity of ratification of a treaty, as noted, in order for the UAE to be bound by a treaty. This may open the question of what violation the agreement contained that can be discussed in the light of Article 46 of the Vienna Convention on the Law of the Treaty of 1969. This is indeed an interesting area where further research may need to be done. However, such a task is beyond the scope of this work.

⁷⁴ This possible tri-section point, Article 2 provides, shall be determined by agreement between the three States.

⁷⁵ Article 1 of the agreement.

⁷⁶ In reality, this was a direct result of the Qatar-Saudi Arabia land boundary agreement of 1965. Qatar, in this agreement, accepted Saudi Arabian sovereignty over Khor al-Udayd area.

⁷⁷ Article 2 of the agreement.

government of Saudi Arabia that this recognition was “in conflict with two agreements concluded between the Emirate of Abu-Dhabi and the Sultanate of Oman in 1959 and 1960 delimiting the boundary between them from east of Uqaydat to Umm al-Zamul.”⁷⁸

Moreover, in the last few years UAE officials have expressed to their colleagues in Saudi Arabia their unhappiness with this agreement.⁷⁹ The UAE Government in a note to the Secretariat of the United Nations stated that on the third of November 1993 it proposed to Saudi Arabia that the 1974 agreement “should be amended so as to bring it into line with the International Boundary Agreement between the Kingdom of Saudi Arabia and the Sultanate of Oman.... [And] bilateral negotiations should be conducted with a view to arriving at agreement on other questions raised by certain articles of the Agreement of 21 August 1974.”⁸⁰ Saudi Arabia, the UAE’s note show, expressed its willingness to review the terms of the agreement.⁸¹ Interestingly, the Kingdom of Saudi Arabia registered the text of the agreement in April 1994 with the Secretariat of the United Nations. The Government of the UAE responded by registering a note with the Secretariat of the United Nations in respect to the Saudi act. In this note the Government of the UAE through its Permanent Mission to the United Nations, stated that: “the Permanent Representative of the United Arab Emirates would like to point out that the Agreement of August 1974 should have been amended and agreement reached on the other questions raised by certain of its articles before a request was submitted for its registration under Article 102 of the Charter.”⁸²

⁷⁸ Note from the Permanent Representative of the United Arab Emirates to the United Nation to the Secretariat of the United Nations, no. 101/94, 20 April 1994.

⁷⁹ Schofield, R., “Borders and Territoriality in the Gulf and the Arabian Peninsula during the Twentieth Century,” *Territorial Foundations of the Gulf States*, Schofield R. (ed.), University of London, UCL Press, London (1994), at p.66. Interestingly, some maps published in the UAE in recent years place the area of *Khor al-Udayd* under the UAE sovereignty, see for example the *National Atlas of the UAE*, The University of the UAE Press, Al-Ain, UAE, 1993.

⁸⁰ See the Note from the Permanent Representative of the United Arab Emirates, *op. cit.*, n. 78.

⁸¹ *Ibid.*

⁸² *Ibid.* Likewise, the State of the Sultanate of Oman sent a letter to the Secretariat of the United Nations. The letter was circulated thereafter, at the request of the sender, to the members of the Security Council. The State of the Sultanate of Oman in this letter rejected the UAE-Saudi Arabia agreement. This was because, the Sultanate of Oman alleged, the said agreement affected some

The effect of the agreement on the offshore boundary

The UAE-Saudi Arabia boundary agreement is quite different from the other two agreements concluded by the UAE. This is because it does not finalize the offshore boundary line between the two parties. Rather it has provided a framework for the contracting parties within which a delimitation agreement should be concluded to “delimit the offshore boundaries between the territory of the Kingdom of Saudi Arabia and the territory of the United Arab Emirates and between all of the islands subject to the sovereignty of each of them.”⁸³ This new agreement is expected to materialize, in the next two years or so, since there is grave concern in the Gulf region that the process of finalizing the boundary between the Gulf States should be speeded up.⁸⁴

Article 5 of the UAE-Saudi Arabia agreement contained three particularly important provisions: (1) mutual recognition of the parties’ sovereignty over certain islands; (2) the right to establish constructions, and (3) the creation of a joint sovereignty area. We shall now examine each in turn.

(1) *Mutual recognition*

The United Arab Emirates in this agreement recognized the sovereignty of Saudi Arabia over Al Khuwésat island. The island lies 4.32 nautical miles to the north of the Khor al-Udayd coastline, and about 2.16 nautical miles to the south-west of the UAE island of Ghaghah. Correspondingly, Saudi Arabia recognized the sovereignty of the UAE over all the other islands opposite its coast in the Arabian Gulf.⁸⁵

parts of Omani territory, and Omani people living and enjoying Omani nationality in that territory. See *Aalam Al-khaleej* (Gulf Ward), Monthly newspaper, published in London, no.15, September (1994), at p.3.

⁸³ Article (3) of the UAE-Saudi Arabia agreement. For further discussion on a possible boundary line, see below.

⁸⁴ *Aalam Al-khaleej*, (Gulf Ward), monthly newspaper published in London, no.19, January (1995), at p.1.

⁸⁵ Article 5(1) of the agreement reads: “The United Arab Emirates recognises the sovereignty of the Kingdom of Saudi Arabia over Al Khuwesat island, and the Kingdom of Saudi Arabia recognizes the sovereignty of the United Arab Emirates over all the other islands opposite its coast on the Arabian Gulf.”

(2) Saudi Arabia's right to establish public constructions

Article 5(2) gives to Saudi Arabia the right to establish public constructions on the UAE islands of Al-Qaffay and Makasib.⁸⁶ However, this article is open-textured in nature and the parties should have defined it in more precise terms. Otherwise conflict and disagreement may well arise between the parties, especially with regard to the meaning of the Arabic terms '*mnshat amah*'. This term, which is used in the Arabic text, can have two meanings, either civil constructions or military constructions.⁸⁷

In addition, a controversy may arise between the parties over the following points:

- 1 Does Saudi Arabia have the right to dispose of its rights in establishing constructions on the two Islands to a third state?
2. Does Saudi Arabia have the right to authorize a third state to take part, unilaterally or conjointly, in the establishment or use of constructions on the two Islands?

In the light of the above, the parties are strongly recommended to agree on clarification for the text of paragraph two of Article 5 and to set up the necessary machinery to solve any possible dispute which may arise from the Saudi Arabian presence on the Islands.

⁸⁶ Article 5(2) reads: "The United Arab Emirates agrees to any public construction on the islands of Al-Qaffay and Makasib that the Kingdom of Saudi Arabia wishes to establish thereon."

⁸⁷ In the Arabic language the term '*amah*' (public) is thus opposite to 'private', and means any building and construction that belongs to the state and not to individual. However, the ordinary understanding of the Arabic term '*mnshat amah*' it is suggested in its most natural sense, is civil construction, and not military construction. So, Article 5(2) gives Saudi Arabia the right to build any public constructions. This may include, for example, constructing a beacon for navigation purposes, building a leisure area, port, and so on. See *AL wassit Arabic-Arabic Dictionary*, 2nd ed., vol. 2, Arabic Language Institution, Egypt (1973). This is indeed an interesting point, where further research and investigation may be required in order to determine the accurate meaning for the terms. However, such research is connected with the law of treaties, and therefore beyond the scope of this work.

(3) Creating a joint sovereignty zone

Condominium or joint sovereignty, as a solution to rival political interests in particular areas, is not unusual.⁸⁸ There have been a number of examples where this solution has been utilized. The Gulf area contains one such example: the case of the Saudi Arabia-Kuwait neutral zone of 1965.⁸⁹ Condominium has been defined as:

a term of art in international law [which] usually indicates...a structured system for the joint exercise of sovereign governmental powers over a territory; a situation that might more aptly be called co-imperium.⁹⁰

Condominium can be created by agreement between the parties involved,⁹¹ whether over land or maritime territory.⁹² International adjudication applying *international law*⁹³ cannot, therefore, impose a condominium solution.

The regime of condominium in the UAE-Saudi Arabia boundary agreement

Article 5(3) of the agreement provides:

The High Contracting Parties shall have joint sovereignty over the entire area linking the territorial waters of the Kingdom of Saudi Arabia and the open seas

⁸⁸ Brownlie, I., *Principle of Public International Law*, 4th ed, Clarendon Press, Oxford (1990), at p.116.

⁸⁹ The text of the agreement was reprinted in Al-Baharna, *Arabian Gulf States*, 2nd ed, Librairie De Liban, Beirut (1975), at p.376. For further discussion on Saudi Arabia-Kuwait neutral zone, see Huneidi, I., "The Saudi/Kuwait Joint development areas of the Neutral zone, onshore and offshore," *Joint Development of Offshore Oil and Gas*, vol. 2, the British Institute of International and Comparative Law, Fox H. (ed.), London (1990), at pp.77-88.

⁹⁰ *Gulf of Fonseca Case*, at para.399. The following definition of condominium has been suggested: "a piece of territory consisting of land or water is under the *joint tenancy* of two or more States, these several States exercising sovereignty conjointly over it, and over the individuals living thereon." *Oppenheim's International Law*, vol.1, 8th ed., Lauterpacht, H. (ed.), Longmans (1955), at p.453.

⁹¹ *Gulf of Fonseca Case*, at para. 399. It can also be terminated by agreement. The Chamber in the *Gulf of Fonseca Case* (a case concerning the dispute over land, islands and the maritime boundary between El Salvador and Honduras) did not rule out the legal possibility of substituting condominium, over the waters within the Gulf, by the delimitation of separate areas of sovereignty. The Chamber in this relation held that: "It is...not suggesting that the waters subject to joint sovereignty cannot be divided, if there is agreement to do so. Condominium can cease to exist given the necessary agreement." See para.409. See also Scobbie, I., "The ICJ and the Gulf of Fonseca," 18 *Marine Policy* (1994), at p.253.

⁹² On the possibility of creating a Condominium over a maritime territory, the Chamber of the International Court of Justice in the *Gulf of Fonseca Case* of 1992 held that: "Certainly there is no reason why a joint sovereignty should not exist over maritime territory." See para.401.

⁹³ But international adjudication applying *ex aequo et bono* procedures may, if such a solution is necessary for reaching an objective justice, decide a joint sovereignty area. For further discussion, see Chapter Seven.

In future offshore delimitation between the UAE and Saudi Arabia the geographical character of the area would result in the highly unusual situation where Saudi Arabia's territorial sea would be blocked off from the open sea by the UAE's maritime zones.⁹⁴ To avoid this situation, the two parties agreed on the creation of a joint sovereignty zone [hereafter JSZ] to secure for Saudi Arabia free and direct access to the open sea through the UAE maritime zones. Logically, the area where joint sovereignty is to be exercised is beyond the territorial sea limit of Saudi Arabia

The inner and the outer limit of the JSZ

There is no difficulty in determining the inner limit of the condominium area between the UAE and Saudi Arabia. The inner limit is the outer limit of Saudi Arabia's territorial sea in the area of Khor al-Udayd. However, there is some difficulty and ambiguity in determining the outer limit of the JSZ between the two States. In accordance with the provision of Article 5(3) of the agreement, the outer limit of this area is the open sea. But, there is no open sea in a semi-enclosed sea such as the Arabian Gulf, nor is there room for suggesting that the outer limit of the area is the open sea, in the usual sense of the term, in the Indian Ocean. Thus, what is meant by the term 'open seas'?; where can a possible outer limit for the JSZ be determined? In the next paragraphs an attempt will be made to address these issues.

Suggesting an outer limit for the JSZ

It is suggested that the concept of joint sovereignty in the context of this agreement can only be exercised in the area where the UAE itself has full sovereignty. The territorial sea area is the only area with this description, since the other three zones of national jurisdiction give the coastal state only sovereign rights for certain purposes. Hence the area beyond the UAE territorial sea limit would appear to have been in the minds of the two parties, as the open sea, when they drafted their agreement. This area in the modern law of the sea is the

⁹⁴ See the map at p.196.

exclusive economic zone. All states, according to Article 58 of the 1982 Convention, enjoy in the EEZ the freedoms referred to in Article 87, namely, navigation and overflight in the EEZ and other peaceful uses of sea.⁹⁵ The concept of the EEZ in 1974 was a new one, and had not yet become firmly accepted among coastal states.⁹⁶ The ICJ in the *Fisheries jurisdiction Case* of 1974, between the UK and Iceland concerning, *inter alia*, the legality of Iceland's declaration of an EFZ up to 50 nautical miles around its coast, stated that:

the Icelandic Regulations of 14 July 1972...are not opposable to the United Kingdom, and the latter is under no obligation to accept the unilateral termination by Iceland of United Kingdom fishery rights in the area.⁹⁷

Moreover, there was uncertainty about the rights of coastal states in the EEZ.⁹⁸ This uncertainty, regarding the acceptability of the EEZ and the ambiguity about the rights of the coastal state in this new zone, were the reasons why the two parties in their agreement adopted Article 1 of the 1958 Geneva Convention on the high seas to accept that any area not included in the territorial sea or the internal water of coastal states was high seas or open seas. Nonetheless, there is considerable evidence to suggest that the two parties were aware of the concept of the EEZ prior to the conclusion of their agreement on 21 August 1974. For instance both supported the regime of the EEZ at the UNCLOS III. This support is found in their statements of 9 July 1974 in the 34th meeting in the case of the UAE,⁹⁹ and in the 35th meeting in the case of Saudi Arabia.¹⁰⁰ Furthermore, the Kingdom of Saudi Arabia declared on 30 April 1974, an exclusive fishing zone

⁹⁵ For further discussion on these freedom, see chapter One/Section Four.

⁹⁶ See Churchill and Lowe, *The Law of the Sea*, Manchester University Press, New rev. ed., Manchester (1988), at p.134.

⁹⁷ *Fisheries jurisdiction Case*, (UK. v. Iceland) at para.67.

⁹⁸ As noted in Chapter One, some states preferred to establish an EFZ, because they were uncertain about the rights of coastal states within the EEZ. See Chapter One/Section Four.

⁹⁹ *UNCLOS I Official Records*, vol. I, at p.141, para.36.

¹⁰⁰ *Ibid.*, at p.144, para.24.

around its coasts.¹⁰¹ It is worth mentioning here that Article 3 of this Declaration considered the Saudi fishing zone as a high seas area.¹⁰²

It seems right in light of the above to conclude that the UAE-Saudi Arabian JSZ is an area that should be measured from the outer limit of the Saudi Arabian territorial sea, and extend to the outer limit of the UAE's territorial sea. The breadth of the UAE territorial sea in this area is *per se* the breadth of the UAE-Saudi Arabia joint sovereignty area. As a result of the foregoing, the parties meant by the term 'open sea', (in Article 5(3) of the agreement) what is now the EEZ of the United Arab Emirates.

The length and the width of the JSZ

There are two possible limits for the width of the joint sovereignty area. First, the joint sovereignty area may be limited to the width of a corridor or a navigation channel, which would link the territorial water of Saudi Arabia to the open seas through the UAE territorial sea. Second, the joint sovereignty area may be argued to correspond to that of the Saudi territorial sea. This, in practice, would be approximately 30 nautical miles.¹⁰³

However, there is no need, in practical terms, to regard the width of the joint sovereignty area as corresponding to that of the Saudi territorial sea, since the corridor alternative would secure for Saudi Arabia free and direct access to the open seas. On the other hand, there is no need to minimize the UAE's pre-existing sovereignty by unnecessarily extending the width of the joint sovereignty area beyond the necessary limit. Therefore the preferable view is that which causes the least possible disturbance to the UAE's pre-existing sovereignty, i.e. the channel or corridor option. This restrictive interpretation can be justified by the fact that the arrangement giving Saudi Arabia free access through the UAE territorial sea implies in reality some kind of obligation and limitation on the pre-

¹⁰¹ Reprinted in EL-Hakim, A., *The Middle Eastern States and the Law of the Sea*, Manchester University Press, Manchester (1979), at p.204.

¹⁰² Article 3 reads: "The implementation of this declaration shall not prejudice the status of the fishing zones as high seas in accordance with established principles of international law." Quoted from *Ibid.*, at p.204.

¹⁰³ See below 'A Possible Boundary Line Between the Two States'.

existing sovereignty of the latter. Such provision and arrangements, as the Permanent Court of International Justice stressed in the *Wimbledon Case*,¹⁰⁴ and in the case of the *Territorial jurisdiction of the International Commission of the River Order*,¹⁰⁵ should be restrictively interpreted in the case of doubt.¹⁰⁶

Fortunately, there is no automatic implementation and designation of the joint sovereignty area, since the 1974 agreement called upon the parties to enter into negotiations in order to implement and designate it. What the joint sovereignty area entails, therefore, is not possible to determine since negotiations have not taken place or, if they have taken place, no information has been released to the public.¹⁰⁷ However, it is very likely that the negotiation between the two parties may be hindered by the lack of an area suitable for deep-water navigation.¹⁰⁸

The legal status of the water within the joint sovereignty area

The Chamber of the ICJ in the *Gulf of Fonseca Case* accepted the fact that the waters of that Gulf were subject to the joint sovereignty of the three riparian States.¹⁰⁹ These waters, the Chamber held, were not territorial sea *per se* but subject to a *sui generis* regime.¹¹⁰ In this regime the parties enjoy “perfect equality of user of the waters and of common legal rights and the exclusion of any preferential privilege.”¹¹¹ Moreover, the Chamber asserted that the vessels of other states enjoy the right of innocent passage within the Gulf.¹¹²

¹⁰⁴ PCIJ Reports Series A-N°1, at p.24.

¹⁰⁵ PCIJ Reports Series A-N°23, at p.26.

¹⁰⁶ The Court in the *River Order Case*, however, held that there should be no recourse to a restrictive interpretation unless other means of interpretation had been exhausted. See *Ibid.* For more discussion on restrictive interpretation, see Lauterpacht, H., “Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties,” 26 *BYBIL* (1949), at pp.61-7; McNair, *op. cit.*, n.56, at pp.762-6; Brownlie, *op. cit.*, n.88, at p.631; Sinclair, *op. cit.*, n.56, at p.133; Fitzmaurice, *op. cit.*, n.59, at p.372.

¹⁰⁷ The fact that the 1974 agreement was for Saudi Arabia—and (probably) still is for the UAE—one of the top national secrets makes any attempt to find an answer to these questions an impossible task without assistance from the two parties. I had an opportunity to visit the UAE Ministry of Foreign Affairs and the Saudi Arabia Embassy in the UAE. However, neither would agree to release any information concerning the agreement.

¹⁰⁸ The area of *Khor al-Udayd* is extremely shallow waters. For geographical description, see above at note 62.

¹⁰⁹ The *Gulf of Fonseca Case*, at para.404.

¹¹⁰ *Ibid.*, at para.412.

¹¹¹ *Ibid.*, at para.407. Hence there is no exclusive sovereignty for either of them. This, however, may be in conflict with a coastal state’s right to have a defined maritime area attributed to it, over

However, it is unclear with this type of regime, which may be suggested as a description of the water within the UAE-Saudi Arabia JSZ, whether each party has the right “to challenge the innocence of a [third state’s] vessel’s passage” in this area.¹¹³ Similarly, it is unclear whether the right can be suspended and if so, by whom. The two parties therefore are required to determine an acceptable framework for these issues.

Exception to the regime of condominium

The two parties in an exchange of letters on the date of signature excluded the natural resources¹¹⁴ of the sea-bed and subsoil from the rights of joint sovereignty.¹¹⁵ This, the parties agreed, should continue to be under the exclusive sovereignty of the United Arab Emirates. However, difficulties may arise here with regard to some activities other than the exploitation of natural resources. These activities include: the rights of the establishment and use of artificial islands, installations, structures, and marine research.¹¹⁶ The question which arises is whether these activities have also been, or should be, excluded from the right of joint sovereignty. The exchange of letters gives no indication of a solution to this problem. It is important to note that there are no *travaux préparatoires*, for the texts of the agreement have never been released to the public. Consequently, we have been left without any supplementary means of interpretation that may help to find an answer to the above question. Against this background, we shall proceed to interpret the relevant parts of the text of the exchange of letters according to the rules of interpretation enunciated in Article

which it can exercise sole jurisdiction, conferred on it by International Law, *Gulf of Fonseca Case*, at para. 407.

¹¹² *Ibid.*, at para. 412.

¹¹³ Shaw, M., “Case concerning the land, Island and Maritime Frontier Dispute Case (El Salvador v. Honduras: Nicaragua Intervening), Judgement of 11 September 1992,” 42 *ICLQ* (1993), at p.936.

¹¹⁴ The scope of these resources as to which coastal state is entitled to in international law is well illustrated in Article 77(4) of the 1982 Law of the Sea Convention.

¹¹⁵ Paragraph two of the exchange of letters provides that the JSZ “does not extend to ownership of the natural resources of the sea-bed and subsoil, inasmuch as these resources continue to be owned by the United Arab Emirates alone as an exception to the rights of joint sovereignty.”

¹¹⁶ These activities are well-reflected in Articles 88 and 81 of the 1982 Law of the Sea Convention.

31(1) of the Vienna Convention on the Law of the Treaties.¹¹⁷ Article 31(1) declared that:

A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

As we saw at an earlier stage, the sovereignty of a coastal state over its territorial sea extends to the sea-bed and subsoil as well as to the superjacent waters and the air space above these waters.¹¹⁸ In the 1974 agreement the UAE agreed with Saudi Arabia to create a JSZ over a part of the UAE's territorial sea. The object and purpose of this is well-illustrated in Article 5(3) of the agreement; to ensure for Saudi Arabia free and direct access to the high seas. The two parties in the exchange of letters exclude the natural resources of the sea-bed and subsoil of the JSZ from the rights of joint sovereignty. The purpose of this exclusion is to enable the UAE, and the UAE alone, to continue exploring and exploiting these resources. It is well-known that the exploration and exploitation of natural resources require other activities, such as conducting marine research, constructing artificial islands, installations, and other offshore structures. There is a strong argument, in the light of the principle of good faith and object and purpose of the two parties' exchanges of letters, to suggest that the rights over these activities should also continue to be held exclusively by the UAE. Otherwise the exception to the joint sovereignty rights which the parties have agreed upon would fail to attain its objective, in that the UAE would lack comprehensive rights in respect to these activities. This interpretation would not be in conflict with the purpose of creating the JSZ; that is to secure for Saudi Arabia free and direct access to the open sea. This direct passage is not dependent upon the exercise of any rights connected with the exploration and exploitation of the natural resources of the sea-bed and subsoil.

It might be argued that such an interpretation is beyond the scope of the ordinary meaning of the words actually used. Such an argument, however, cannot

¹¹⁷ This Article was regarded as having passed into the general principle of international law. *Libya v. Chad Territorial Dispute Case*, at para.41. See also Sinclair, *op. cit.*, n.56, at pp.131 and 153.

¹¹⁸ See Chapter One.

be sustained, since, in the words of Professor Sinclair, the “true meaning of a text has to be arrived at by taking into account all the consequences which normally and reasonably flow from that text.”¹¹⁹ He went on to remark that “there is no such thing as an abstract ordinary meaning of a phrase, divorced from the place which that phrase occupies in the text to be interpreted.”¹²⁰

To conclude, the agreement to exclude natural resources of the sea-bed and subsoil from the rights of joint sovereignty should be interpreted to mean that the sovereignty over these resources and over other activities that are associated with the exploration and exploitation of these resources would continue to be under the sovereignty of the UAE alone. Saudi Arabia should have no rights over the sea-bed’s resources or the activities that are linked with the right of exploring and exploiting the natural resources of the sea-bed and subsoil. Adopting such an interpretation is necessary to secure for the UAE unimpeded and effective exploitation of the natural resources that agreed to be under its exclusive sovereignty. Any other meaning that can be attached would deprive the text of the exchange of matters of its effect and could well, moreover, lead to an unreasonable result.¹²¹

The concept of equity in the light of Article 5(3)

The two parties agreed that the boundary line between their territorial seas should be determined on the basis of equity to ensure free and direct access to the open seas from the territorial waters of Saudi Arabia. It is well-known that the concept of equity is often suggested in the course of the delimitation of continental shelf boundaries.¹²² The parties in the 1974 agreement, nevertheless, have introduced equity in the context of a territorial sea delimitation.¹²³

¹¹⁹ Sinclair, *op. cit.*, n.56, at p.121.

¹²⁰ Ibid. See also *Qatar v. Bahrain Case* (1995), at para.40. And see Cullen, J.L., *The Rules of Treaty Interpretation in International Law*, LLM Thesis, University of Edinburgh (1992), at p.84.

¹²¹ For discussion of the principle of effectiveness, see also Fitzmaurice, *op. cit.*, n.59, at pp.816-9; *Qatar v. Bahrain Case* (1995), at paras. 27, 28, 35 and 63.

¹²² See Chapter Three.

¹²³ In a treaty relationship states often made reference to equity “as a way of allowing exceptions to be made when individual circumstances appear to call for them.” See Schachter, O., *International Law in Theory and Practice*, Martinus Nijhoff Publishers, the Netherlands, (1991) at p.56.

From the two parties' point of view the equitable delimitation will be that which would ensure for Saudi Arabia free and direct access between the open seas and that part of the territory of Saudi Arabia. It is arguable that the role of equity is to be limited only to the act of designating a linking area, where the two parties would have joint sovereignty, and not to the act of drawing the boundary line between the two territorial seas. In order to reach an equitable result the parties need to select an area where the depth of the water is suitable for navigation and free from the usual obstacles, such as reefs, rocks and shallow water in general. A possible equitable designation for the joint sovereignty area has therefore been suggested below and illustrated on a sketch map.

A possible equitable designation for the Joint sovereignty area

The suggested area, illustrated on the sketch map below, is a corridor about 3.78 nautical miles in width and 55 nautical miles in length. From the outer limit of the Saudi Arabian territorial sea it runs in a north-easterly direction for about 18 nautical miles between the UAE islands of Makàsib and Al-Qaffày on the one hand, and the UAE-Qatar continental shelf boundary line of 1969 on the other. This is the only area, according to available geological data, where free and direct access from Saudi territory to the open seas can be achieved.¹²⁴ Moreover, the Saudi Arabian right to establish public constructions on the UAE islands of Makàsib and Al-Qaffày can be invoked to sustain this possible designation for the Joint sovereignty area. The said islands are located at the south-eastern limit of the suggested designated area. Saudi Arabia would thereby secure free and direct access to its constructions on these two islands without needing to pass through the UAE territorial sea area. The corridor of the JSZ turns to the east for a distance of about 37 nautical miles until it reaches the open seas, i.e. the UAE's EEZ.

¹²⁴ See the *National Atlas of the UAE*, *op. cit.*, n.79, at p.22.

The Rights of the State of Qatar in the light of Article 62

The UAE as a sovereign state has the right in International Law to cede sovereignty over any part of its territory to another state.¹²⁵ The validity of this transfer does not depend, properly speaking, on the will of a third state.¹²⁶ This being so, the consequence of transferring sovereignty may open the question of the rights of a third state to invoke the principle of fundamental change in circumstances as a ground for terminating an existing agreement. The UAE has relinquished sovereignty over the area of Khor al-Udayd where it had an adjacent land boundary with Qatar. The coastal states' rights in respect to the continental shelf is derived from its sovereignty over the landmass. The UAE, after it renounced its title over Khor al-Udayd, had no landmass adjacent to Qatar, from which its sovereignty over the continental shelf, adjacent to Qatar, might be derived. This may raise the question of whether the State of Qatar has the right to terminate its continental shelf boundary agreement of 1969 with the UAE by invoking the principle of fundamental change in circumstances.

The answer does not seem to be in the affirmative. This is so for two reasons:

1. In the light of Article 62 of the Vienna Convention on the Law of Treaties the concept of fundamental change in circumstances may not be invoked as a ground for terminating or withdrawing from a treaty establishing a boundary. Juridically, this—as we have seen—extends to the maritime boundary as well as to the land boundary.¹²⁷
2. A glance at the map shows that the UAE side of the agreed boundary line with Qatar is dominated by a significance number of the UAE islands, such as Das, Diyénah, 'Arzanah, Dalmà, Sir Bani Yàs, Ghàghah, al-Qaffây, al-Mihayyimàt, and Makàsib. Thus the continental shelf has remained under UAE jurisdiction, which derived from its sovereignty over these islands. Therefore the essential nature of the agreement, in respect of the continental shelf, probably remains

¹²⁵ *Oppenheim's, op. cit.*, n. 53, at p.680.

¹²⁶ For a dissection on the right of veto for third state with regard to cession of territory, see *Oppenheim's, op. cit.*, n. 53, at p.683.

¹²⁷ See Chapter Two/Section One.

unchanged as a result of the UAE's renunciation of its title over the area of Khor al-Udayd.

The impact, if any, of the 1974 agreement on the Qatar-Abu-Dhabi agreement of 1969

It will be recalled that the Qatar-Abu-Dhabi continental shelf boundary line extends for a distance of 115 nautical miles. This line extends from point 'A' to point 'D', where the outer limits of the two parties' 3-nautical-mile territorial sea intersects. So, the agreed boundary line does not extend far enough to determine the boundary line between their territorial seas.¹²⁸ The UAE in 1974 ceded its sovereignty over the Khor al-Udayd area to Saudi Arabia.¹²⁹ The Khor al-Udayd sector thereby became under the sovereignty of the successor state, i.e. Saudi Arabia. This change in the Khor al-Udayd's ownership could not effect the existing continental shelf boundary line between Qatar and Abu-Dhabi (UAE) that determined earlier. This is because, as noted in Chapter Two, boundary agreements enjoy a degree of stability, and the succession of a state, according to Article 11 of the Vienna Convention on Succession of States of 1978, does not effect a boundary agreement. Hence, Saudi Arabia, as a successor state, is obliged to respect the Abu-Dhabi-Qatar agreement of 1969.¹³⁰ Nevertheless, Qatar sent a note to the Secretariat of the UN in which it declared that it reserved all the rights against any effect on its agreement with Abu-Dhabi of 1969 that may result from the 1974 Saudi-UAE agreement.¹³¹

A possible maritime boundary line between the two States

In 1958 the Kingdom of Saudi Arabia by decree extended its territorial sea limit to 12 nautical miles.¹³² The UAE did likewise in 1993.¹³³ The two

¹²⁸ For further discussion on the Qatar-Abu-Dhabi boundary agreement, see above pp.163-70.

¹²⁹ Hence, Saudi Arabia is responsible with Qatar for determining the boundary line between the north-western side of the Khor al-Udayd area and Qatar's territorial sea on the north-eastern side.

¹³⁰ See Chapter Two for further discussion of the stability of boundaries.

¹³¹ The Qatar Ministry of Foreign Affairs Note no. 95/2146-3/200/15, 16 December 1995.

¹³² The Saudi Arabia Official Gazetteer (Umm al-Qura), no. 1706, 21 February 1958.

¹³³ The Federal Law no. 19 of 1993 in respect of the Delimitation of the Maritime Zones of the United Arab Emirates, *The UAE Official Gazetteer*, issue no. 257 (1993). See also Chapter One/Section One.

legislative measures contain provisions for the delimitation of the territorial sea boundary. However, the Saudi decree contains no reference to any particular method to be used in the delimitation, rather it asserts that the boundary of the territorial sea shall be determined by the Government in agreement with other states in accordance with equitable principles.¹³⁴ By way of contrast, the UAE Federal Law provided the median line system for the delimitation of the UAE territorial sea boundary. This provision will be discussed in detail in the next chapter.

The geographical relationship between the UAE coast and the Saudi Arabian coast, is such that it is laterally adjacent in the inner sector, but opposite in the outer sector. The land boundary terminal point is point 'A' on Dawhat As Sumeran at the coast of the Arabian Gulf. This point was determined in the 1974 agreement.¹³⁵ A possible simplified equidistance line between the two coasts should therefore originate from point 'A' on the land boundary. The line (Figure 12) could extend from this point in a straight line proceeding north-west to point '1', leaving Al Khuwesat island to the south-west and Gahaghah island to the north-east of the boundary line.¹³⁶ The two islands are located close to the median line between the two parties, and face each other. Thus they would cancel out each other and have no effect thereby in the delimitation.¹³⁷ As a result, no departure from the median line is necessary according to Article 15 of the 1982 Convention. The UAE-Saudi Arabia boundary line would intersect with the Qatar-UAE agreed continental shelf boundary line of 1969. The tri-section point between the territorial seas of Qatar, UAE and Saudi Arabia would be called point D2. The total distance for the possible UAE-Saudi Arabia boundary line is about 25 nautical miles, from point 'A' on the UAE-Saudi Arabian land boundary

¹³⁴ Article 7 of Saudi Arabia Decree no. 33 of 1958.

¹³⁵ Article 2 of the 1974 UAE-Saudi Arabia boundary agreement.

¹³⁶ For further description and illustration of a strict equidistance line between the two parties, see Al-Ulama, *op. cit.*, n.62, at pp.184-5. Similarly, see Al-Muwaled, F.M.J, *Maritime Boundary Delimitation of the Kingdom of Saudi Arabia*, A study in Political Geography, Thesis submitted for the degree of Ph.D., University of Durham (1993), at pp.90-3. See also Figure 3.5 at p.51 of Al-Muwaled, F.M.J, Supplementary Volume Atlas.

¹³⁷ See Chapter Six for a discussion on the effect of islands on maritime boundary delimitation.

terminal point, to point 'D2' on the Qatar-UAE continental shelf boundary line.¹³⁸

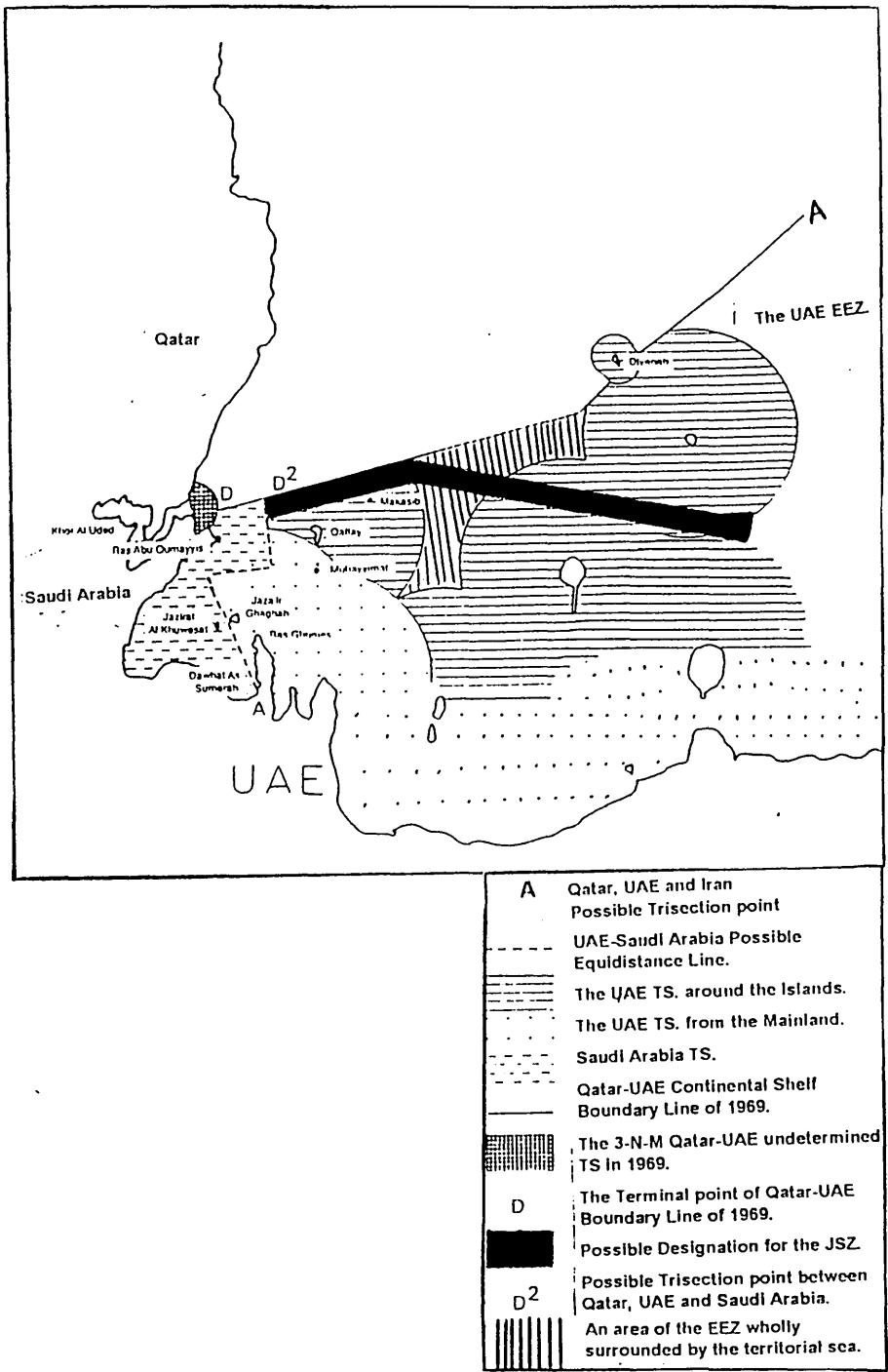


Figure: (12) A possible maritime boundary line between UAE and Saudi Arabia.
Source: The Author.

¹³⁸ The total distance of the Qatar-UAE boundary line would be as a result $115-9=106$ nautical miles.

The Remaining delimitations

The UAE, in addition to the foregoing, has yet to determine its boundary with Oman, Saudi Arabia and with Iran, with respect to the area of the continental shelf opposite the Emirates of Sharjah, Ajman, Umm al Qaiwain and Ras al-Khaimah coasts.¹³⁹ Each case will be examined in turn.

(1) Oman-UAE boundaries

Oman is an adjacent country to the UAE, sharing a common border at the bottom of the Arabian Gulf and in the Gulf of Oman. On 5 April 1981, the state of Oman and the government of Ras al-Khaimah concluded a compact to determine the boundary between them. As far as the maritime boundary is concerned, Article 1(4) of 1981 agreement reads:

The offshore boundary extends, from the land boundary terminal point, towards the sea in accordance with international law.

This somewhat empty provision is similar to the formula of Article 83(1) of the 1982 Convention which was examined at an earlier stage.¹⁴⁰ This similarity may be because the parties were influenced by the compromise formula for continental shelf delimitation which emerged in the 1981 session of the UNCLOS III. Nothing much need be said about the UAE-Oman maritime boundary, save that the Omani Foreign Minister stated, on 9 April 1993, that: “The frontier dispute between Oman and the UAE is completely settled.”¹⁴¹

Interestingly, this statement, if true *in toto*, relates solely to the land boundary according to an informal source in the UAE government. There is no information about the existence of a maritime boundary agreement between the two countries. Hence the UAE needs to define its territorial sea, contiguous zone, exclusive

¹³⁹ See the enclosed map at the end of this chapter.

¹⁴⁰ For further discussion on the formula of Article 83(1) of the 1982 Convention, see Chapter Three/Section One.

¹⁴¹ *Arab Times*, 10 April (1993). It is worth mentioning here that the UAE and Oman have set up in the last few years a high Commission of high-ranking officials from the two States. Their mandate is to settle and reconcile any dispute, including boundary disputes, that may arise between the two countries.

economic zone and the continental shelf boundaries with Oman.¹⁴² It goes without saying that this will not be possible until the two parties reach an agreement to determine the terminal land boundary points between them. This needs to be done in the UAE (Ras al Khaymah) and Oman (Khassab) at the Arabian Gulf, and between the UAE (Sharjah) and Oman (Dibba) at the Gulf of Oman; and, finally, between the UAE (Sharjah) and Oman (Shanase) at the Gulf of Oman.¹⁴³

This being so, the Ras al-Khaimah-Oman agreement of 1981 raised some concern about the right of the former, as a component unit in the UAE federation, to enter into a treaty relationship with a foreign state despite the fact that Ras al-Khaimah is not state in international sense of the term.

It was mentioned in the general introduction to this work that the UAE Constitution did not entirely prohibit the Emirates' members of the federation from entering into separate agreements or compacts with other neighbouring states. This authority to conclude treaties, which normally falls within the federal government and only exceptionally within the member Emirates, is not an unusual practice in other federal states. The Constitution of the United States, for example, contains the following provisions:

(3) No State shall, without the Consent of Congress, ... enter into any Agreement or Compact with another State or with a foreign Power.¹⁴⁴

In the UAE Constitution the right of the member Emirates to enter into a treaty relationship is subject to the following conditions:

- 1- The agreement should be with a neighbouring state, and one which is of a local and administrative nature.
- 2- It should not be in any way contrary to the interests of the Union or the Union laws.

¹⁴² Most likely the two States would follow their pre-existing practices and determine one single maritime boundary line between their respective offshore zones.

¹⁴³ See also Chapter Five/Section Two.

¹⁴⁴ Article 10(3) of the USA Constitution. For additional examples, see McNair, *op. cit.*, n.56, at p.38; Sohn L. and Shafer P., "Foreign Affairs," *Studies in Federalism*, Bowie R. and Friedrich C. (eds.), Little, Brown and Company, Toronto (1954), at pp. 255-8.

3- The Union should be informed in advance about any agreement which the Emirate wishes to conclude.

4- The Union should raise no objections to the conclusion of such agreements.¹⁴⁵

In the event of differences between the Emirate and the Union authority the matter shall be submitted to the Union Supreme Court to rule on the dispute.¹⁴⁶

In 1981 Ras al-Khaimah signed an agreement with the state of Oman to determine the land boundary between them. Without going into exhaustive constitutional argument on whether the Ras al-Khaimah-Oman boundary agreement conforms with the UAE constitutional requirements for an Emirate to enter into such a relationship, one may raise a question from a different angle: whether Ras al-Khaimah as a component or division of the UAE Federation has, in international law, a treaty-making capacity.

The issue was discussed in the ILC work on the Law of the Treaties. Lauterpacht, the Special Rapporteur, in his comment on draft Article 10¹⁴⁷ on the capacity of the parties to conclude treaties in 1953, held the view that treaties concluded by a unit of a federal state “are treaties in the meaning of international law,” if they are compatible with the authority of the unit members of the federal state as assigned to it in the federal constitution. Hence, Lauterpacht continued, in the “absence of such authority conferred by federal law, member States of a Federation cannot be regarded as endowed with the power to conclude treaties.”¹⁴⁸

The matter, however, was viewed differently by Fitzmaurice in his report¹⁴⁹ in 1958 to the ILC. He accepted the capacity of a member state of a federation to enter into a treaty with a foreign power, not in its own right, but as “an agent empowered to conclude treaties on behalf of the union as a whole,”¹⁵⁰ and within

¹⁴⁵ Hence, no consent is required, toleration on the part of the federal authority would be sufficient.

¹⁴⁶ Article 123 of the Constitution.

¹⁴⁷ Draft Article 10 in the Lauterpacht report to the ILC in 1953 reads: “An instrument is void as a treaty if concluded in disregard of the international limitation upon the capacity of the parties to conclude treaties.” *ILC Yearbook* (1953), vol. 2, at p.137.

¹⁴⁸ *Ibid.*, at p.139.

¹⁴⁹ The Third Special Rapporteur.

¹⁵⁰ Fitzmaurice, *ILC Yearbook* (1958), vol. 2, at p.32, para. 26.

the federal constitution limitations.¹⁵¹ In this case the international responsibility to carry out such an agreement would be on “the union as a whole.”¹⁵²

In 1966 the ILC presented to the General Assembly draft Articles on the Law of the Treaties.¹⁵³ Article 5 of the draft contained the following paragraph on the subject of the states members of federations:

2-States members of a federal union may possess a capacity to conclude treaties if such capacity is admitted by the federal constitution and within the limits there laid down.¹⁵⁴

This paragraph, however, met with considerable opposition from the majority of federal states,¹⁵⁵ including India, USA, Canada and the Federal Republic of Germany, in the Vienna Conference on the Law of Treaties. Their objection was that the paragraph did not recognize the exclusive authority of the federal state in interpreting its constitution “to determine whether the constitution conferred a treaty-making capacity upon members of the federation,”¹⁵⁶ or whether an agreement concluded by a component unit is consistent with the federal constitution’s conditions. Such failure in the above paragraph of Article 5 caused a significant number of federal states to feel that “the provision would enable third states to intervene in the internal affairs of federal states by seeking to interpret the constitution of the latter.”¹⁵⁷ This fear, however, was considered by some writers, including Van De Craen, as unfounded. His view was that an

¹⁵¹ A similar view was held by Waldock, the fourth Special Rapporteur, *ILC Yearbook* (1962), vol. 2, at p.36. In addition, he addresses the case of a component of a federation, such as Ukraine and Byelorussia, where the federal constitution and foreign state have recognized the component state as possessing an international personality, which is separate from the personality of the federal state. In this case, Waldock held the view that it is difficult to deny such an entity “any international treaty-making capacity.” See *ILC Yearbook* (1962), vol.2, at p.37.

¹⁵² *ILC Yearbook* (1958), vol. 2, at p.32, para.26.

¹⁵³ *ILC Yearbook* (1966), vol. 2, at p.177, para.36.

¹⁵⁴ *Ibid.*, at pp.191-2.

¹⁵⁵ It is worth mentioning here that the opposition to para. 2 was not limited to federal states; some unitary states, e.g. Japan, Republic of Korea, voted against the provision of this paragraph. See the *Official Records*, the UN Conference on the Law of Treaties, First Session, 1968, New York (1969), at p.69, para.47.

¹⁵⁶ Stanford, J.S., “The Vienna Convention on the Law of Treaties,” 20 *UTLJ* (1970), at p.29.

¹⁵⁷ Shaw, *op. cit.*, n.57, at p.153. See also Stanford, *Ibid.*

“energetic protest and elucidation by the federal government would in such a case be the most apt means for a correct interpretation.”¹⁵⁸

The protest of the federal states to the provision of paragraph 2 of Article 5 was not limited to fear of the possibility of foreign states’ intervention in their domestic affairs. They also advanced the argument that “the paragraph made the constitution—an internal law of the federal state—alone determinative of status and capacity in international law, thereby establishing a principle potentially disruptive of state representation in the international community.”¹⁵⁹

As far as the UAE is concerned, the rights of the Emirates’ members of the Union to conclude separate treaties with other neighbouring states, as noted, is limited by the conditions delineated in Article 123 of the UAE Constitution. The validity in international law of an agreement concluded by an Emirate member of the Union depends on the compatibility of that agreement with the provision of Article 123. Disregarding these provisions would result in the agreement being considered “as having been concluded in disregard of the limitations imposed by international law upon its treaty-making power. As such it is not a treaty in the contemplation of international law. As a treaty, it is void.”¹⁶⁰ This is simply because a state member of a federation has no power in international law to enter into a treaty relationship with other states. In the case where the union constitution gave such a power, the component state would act as a representative in expressing the consent of the federation to be bound by a particular treaty. If the federal constitution made the authority of a component state subject to specific restrictions and requirements, its failure to observe these restrictions would prevent it binding the federation. This would result in the agreement being void in international law, since the representative, i.e. the component state in this case, ignored the limitation placed on it by the federal constitution.¹⁶¹ But where

¹⁵⁸ Frank L.M. Van De Crean, “The Federated State and its Treaty-Making Power,” *Collection de droit international*, Actes du colloque de Bruxelles, institut de sociologie, 26-27 février 1982, Editions Bruylant, Editions de l’Université de Bruxelles (1984), at p.381.

¹⁵⁹ Stanford, *op. cit.*, n.156, at p.29. See also the *Official Records*, the UN Conference on the Law of the Treaties, 1968, First Session, New York (1969), at p.67, para.23.

¹⁶⁰ *ILC Yearbook* (1953), vol. 2, at p.139, para.4.

¹⁶¹ *ILC Yearbook*, (1958), vol. 2, at p.34, para.36.

the agreement is considered to be compatible with the limitation of the UAE Constitution, the federal authority is the responsible entity, *vis-à-vis* other states, to implement such an agreement.¹⁶²

To sum up, the Ras al-Khaimah-Oman agreement gives no indication of the position of the federal government regarding the agreement. There were three possibilities here; (1) the federal authority approved the agreement before its conclusion; (2) the Union had not been informed of the agreement prior to its conclusion; (3) the agreement was concluded, despite the protest of the federal government. In the first case the agreement is valid, and the Union of the UAE as a whole is bound by it. In the second case the agreement in question is voidable; “thus only valid if the federal government does not veto it or approves of it later on.”¹⁶³ In the final case the agreement is void, because Ras al-Khaimah concluded the agreement in a violation to the Union’s constitutional requirement for an Emirate, member of the federation, to enter into a treaty relationship with a foreign state.

(2) The remaining UAE-Iran boundaries

In Chapter Five we shall identify the remaining un-delimited sectors in the Iran-UAE boundary, and the difficulties, if any, holding back the two sides from finalizing the maritime boundary between them.

(3) Saudi Arabia-UAE offshore boundaries

As mentioned above, the two countries should, in accordance with Article 5(3) of the 1974 agreement, enter into bilateral negotiations to conclude an agreement to determine their maritime boundaries.

¹⁶² Ibid., at p.32, para.26.

¹⁶³ Frank L.M. Van De Crean, *op. cit.*, n.158, at p.422.

Section Two

The Inter-Emirates' boundaries

As we saw in the introduction to this work the UAE is a federation of seven Emirates. The UAE constitution preserves the autonomy of the member Emirates in some aspects, notably the member Emirates' sovereignty over their own territories and territorial seas in all matters not within Union jurisdiction.¹⁶⁴ Natural resources¹⁶⁵ are considered in the constitution to be the public property of the individual Emirate where the resource are located. Hence, it was necessary to define the boundary of each Emirate, though these boundaries are no longer to be regarded as international in character, in order to avoid any overlap in exercising jurisdiction or exploring and exploiting the natural resources that in the area. The necessity of defining the boundaries between the component parts of the UAE Federation is well-reflected in the case of the Dubai-Sharjah boundaries. The two Emirates, as will be seen, had to refer their dispute on the delimitation of their boundary to *ad hoc* arbitration, after they failed to reach an agreement. Examination of the Inter-Emirates practice in determine their offshore boundaries provides a valuable source of understanding of the elements of the UAE practice in this respect. Four internal maritime boundaries have been drawn between the various members of the UAE Federation.

A: Abu-Dhabi-Dubai agreements of 1965 and 1968

In 1965 Abu-Dhabi and Dubai accepted a British proposal to determine the boundary between them. This boundary line was initially proposed in 1951 as a boundary between the oil concession area for each party. As far as the offshore boundary was concerned, the boundary line was the equidistance line. It was agreed that this "starts at Ras Hasine on the coast and extends seawards in a

¹⁶⁴ Article 3 of the UAE Constitution.

¹⁶⁵ Natural resource is one of the essential objective behind boundary dispute, see *Libya v. Malta Case*, at para.50; *Gulf of Maine Case*, at paras.48 and 232. See also above at p.152.

straight line in a north-westerly direction.”¹⁶⁶ Shortly afterwards, in 1966, the Continental Oil Company discovered the Fatuah oil field in Dubai’s continental shelf area. The oil field was situated 47 nautical miles off mainland Dubai, and near the boundary line that was agreed upon with Abu-Dhabi in 1965. As a result of a fresh discovery, in 1968 the parties reached an agreement to modify the 1965 boundary line. Under the new agreement, the boundary line was shifted ten kilometres towards Abu-Dhabi to the west of the Fatuah oil field.¹⁶⁷ This was to take account of this field which was located close to the 1965 boundary line. Nothing more need be said about the agreement, except that the island of Sir Abu Nu’ayr, which lies about 12 nautical miles to the west of the boundary line between Abu-Dhabi and Dubai, had no effect upon the boundary line. This is because it belongs to the Emirate of Sharjah which was not party to the 1968 agreement between Abu-Dhabi and Dubai.¹⁶⁸

¹⁶⁶ See Charney and Alexander, *op. cit.*, n.20, at p.1480. Furthermore, the equidistance line proposed by the British Government was quite commonly used to define the various Emirates’ (Formal Trucial States) offshore boundaries in the Gulf.

¹⁶⁷ Ibid. See also EL-Hakim, *op. cit.*, n.101, at p.99.

¹⁶⁸ The island of Sir Abu Nu’Aair becomes an enclave into the Abu-Dhabi territorial sea, as a result of the Abu-Dhabi/Dubai boundary agreement. For the text of the agreement, see Charney and Alexander, *op. cit.*, n.20, at p.1480.

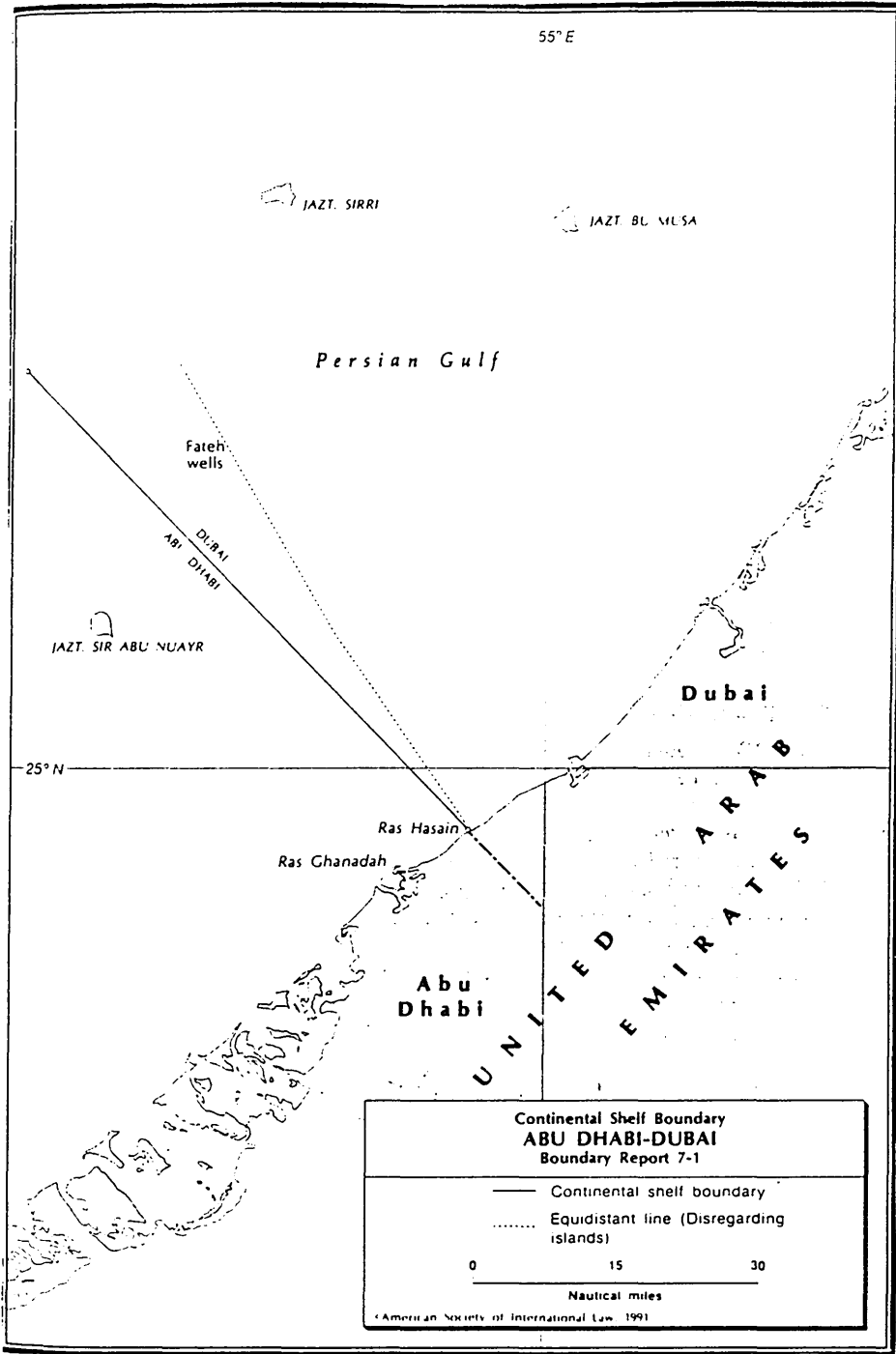


Figure: (13) Abu Dhabi-Dubai boundary line.
Source: *International Maritime Boundaries*, at p.1479.

B: Dubai-Sharjah boundaries¹⁶⁹

The Dubai-Sharjah boundary is the only one in the Gulf region that has been determined by arbitration. The Award, it will be recalled, was between the two adjacent Emirates. There was a land frontier dispute between the two parties. The British Government, during its special treaty relationship with them prior to 1971, took steps to determine the land boundary between Dubai and Sharjah in order to define the oil concession area for each Emirate. The British Political Agent, Mr. Peter Tripp, in 1956-57, made such a proposal.¹⁷⁰ Dubai declined to accept the Tripp proposal. In 1963, the British Government proposed a lateral boundary offshore starting from the Al Mamzar peninsula. This peninsula was the coastal terminal point of the land boundary as proposed by Tripp. Again, Dubai rejected the 1963 proposal since it would result in dividing the Al Mamzar peninsula, to which Dubai laid claim in its entirety.¹⁷¹ Thereafter, the two Emirates joined the other five Emirates, the former Trucial States, to form the Federation of the UAE in 1971. The Federation authority thereafter endeavoured to settle the dispute between the parties.¹⁷² On 30 November 1976, the two Emirates concluded a special agreement to refer their frontier dispute to *ad hoc* arbitration.¹⁷³ The parties in their special agreement did not determine the law which the tribunal should apply. The applicable law in this case must be the Federal Law. However, the Court found, though not surprisingly, that “the constitution of the United Arab Emirates contains no provisions that relate to the law applicable to territorial disputes between the member Emirates.”¹⁷⁴ Therefore, it concluded that:

¹⁶⁹ For further comments on the Arbitration, see Bowett, D.W., “The Dubai/Sharjah Boundary Arbitration of 1981,” 65 *BYBIL* (1994), at pp.103-33.

¹⁷⁰ *Dubai/Sharjah Award*, at p.544.

¹⁷¹ *Ibid.*

¹⁷² *Ibid.*, at pp.695-9.

¹⁷³ Article 1 of this agreement provides: “the outstanding dispute between the two Emirates of Dubai and Sharjah concerning the demarcation of the boundaries between them shall be referred to Arbitration.” See *Ibid.*, at p.550

¹⁷⁴ The constitution documents of the majority of Federations, the Court said, contain no such provisions. See *Ibid.*, at p.586.

although the dispute affects internal relationships within a Federation, it is international law that is applicable. It is, however, necessary to add that the Parties have not authorised this Court to arrive at an Award *ex aequo et bono*.^{175 176}

The Court of Arbitration held its first formal meeting on 2 May 1978. In 1981, the Court delivered its decision in determining the land and sea boundaries between Dubai and Sharjah. Considering the maritime boundary, it found the equidistance method to be the appropriate one for the delimitation and to be required in light of the relevant circumstances of the area.¹⁷⁷ Moreover, the presence of the Sharjah island of Abu Musa (claimed also by Iran), which lies 35 and 36 nautical miles off Sharjah and Dubai respectively, was seen by the Court as a special circumstance, that required a departure from the principle of equidistance. The result of the delimitation, therefore, was a boundary line extending to a distance of roughly 39 nautical miles, where it terminated at the intersection with the Iran-UAE line of 1974. The lateral boundary line contained eight turning and terminal points (A,B,C,D,E,F,G,H). Points A to E were equidistant points from the mainland of the respective parties. From points F to H the boundary line coincides with Abu Musa's arc of a 12-nautical-mile territorial sea limit. The Court of Arbitration refused to give the island of Abu Musa any effect beyond its 12-nautical-mile territorial sea limit. This was in order, the Court indicated, to preserve the equities of the geographical situation and to be "consistent, for example, with comparable regional practices as applied to the island of Al-Arabiyyah and Farise in the Saudi Arabia-Iran agreement of January 1969."¹⁷⁸

¹⁷⁵ Ibid., at p.587.

¹⁷⁶ Recourse to international law to determine the boundary between two components of a federal state is not an unusual practice in the literature. For example, the US Supreme Court acknowledged the application of the 1958 Territorial Sea and Contiguous Zone Convention on the case concerning the lateral boundary between Texas and Louisiana of 1976. For further details, see Charney, J.I., "The Delimitation of Ocean Boundaries," 18 *ODIL* (1987), at pp.497-531.

¹⁷⁷ *Dubai/Sharjah Award*, at pp.550-3, p.658 and p.672.

¹⁷⁸ Ibid., at pp.677-8. For further discussion on the Saudi Arabia-Iran agreement, see Chapter Five/Section One.

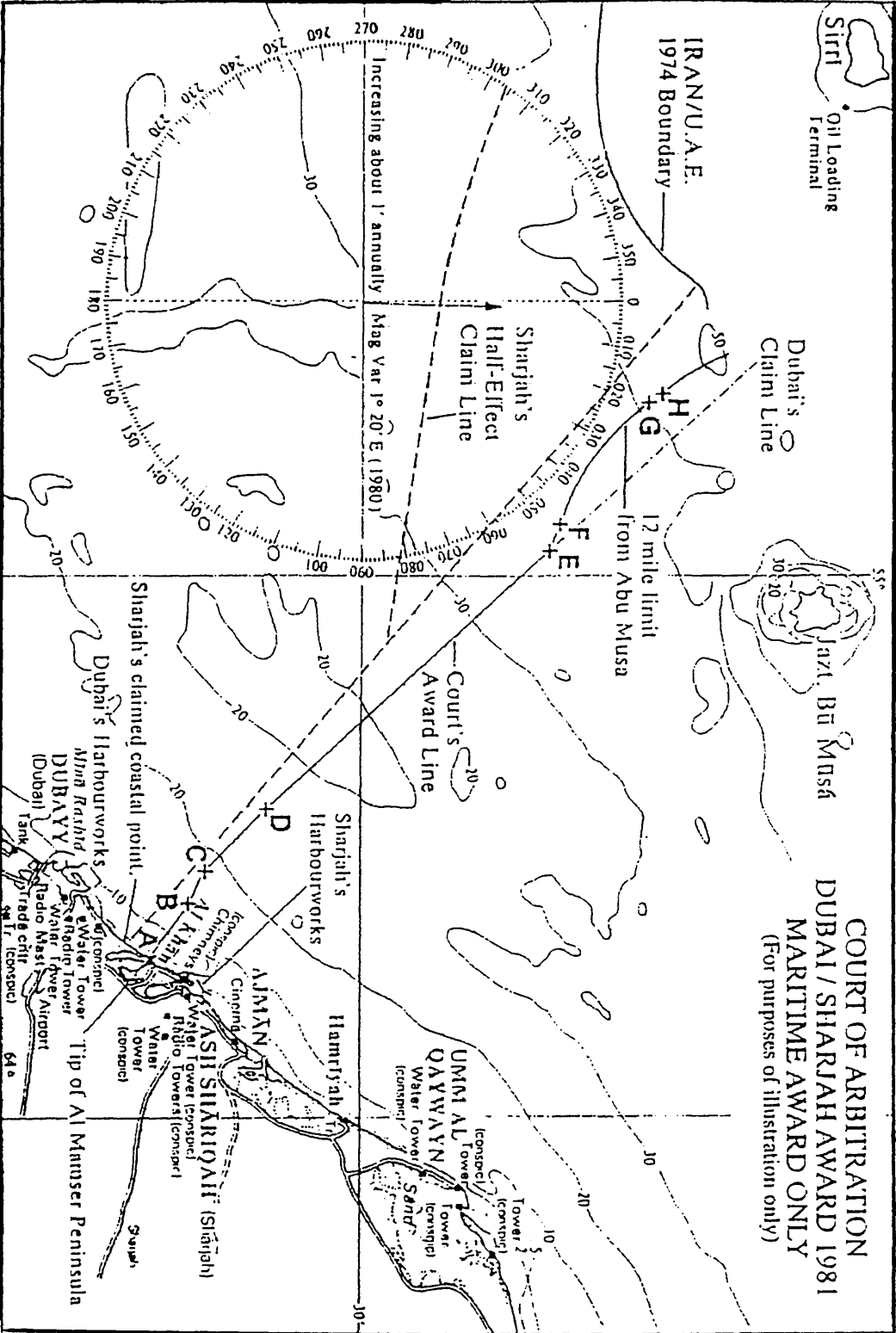


Figure: (14) Dubai-Sharjah boundary line.
Source: Bowett, D.W., "The Dubai/Sharjah Boundary Arbitration of 1981," 65 *BYBIL* (1994), at p.105.

C: Sharjah-Umm al Qaiwain boundaries

As with the boundaries between Dubai and Sharjah, the British Government made a proposal in 1961 to determine the boundary line between the Emirate of Sharjah and the Emirate of Umm al Qaiwain.¹⁷⁹ The two Emirates, in parallel unilateral declarations issued in 1964, declared their acceptance of the British Government's proposal.¹⁸⁰ The parties, at that time, were known to have a 3-nautical-mile traditional limit for their territorial sea. The declaration of the two Emirates, in 1964, did not explain the effect of the Sharjah island of Abu Musa, which lies on the Umm al Qaiwain side of the equidistance line, and 35 nautical miles from the Sharjah mainland. There was no map attached to either declaration, but a 3-nautical-mile limit around the island of Abu Musa was shown on one Admiralty Chart, which was produced by the British Foreign and Commonwealth Office.¹⁸¹ Restricting the territorial sea limit of Abu Musa island to 3 nautical miles was rejected by the Government of Sharjah. This stance was based on the fact that the two Emirates declarations of 1964 "established only a lateral sea boundary between Sharjah's mainland territory on the Arabian Gulf and Umm al Qaiwain, running...from the terminus of the land frontier, seaward on an azimuth of 312° for an undefined distance. It was not, therefore, an agreement establishing a continental shelf boundary."¹⁸²

In 1969 the two Emirates granted an oil concession to two foreign companies. The Occidental Petroleum Corporation obtained from the Umm al Qaiwain Government the right to explore for and exploit oil within all the territories in the Emirate. The Buttes Gas and Oil Company obtained from the Sharjah Government similar rights. A decree dated 10 September 1969 was issued by the

¹⁷⁹ The proposed boundary contained a "line starting from a point on the coast near the site of the dead well Mirdar Bu Salaf and going out to the sea on a bearing of 312°." For the text of the agreement, see Charney and Alexander, *op. cit.*, n.20, at p.1555.

¹⁸⁰ *Ibid.*, at p.1549.

¹⁸¹ House of Lords' decision in *Buttes Gas and Oil Constitutional. v. Hammer Case*, 29 October 1981. The decision was reproduced in 21 *ILM* (1982), at p.95.

¹⁸² Sharjah argument in *Dubai/Sharjah Award*, at p. 667.

Government of Sharjah to extend its territorial sea limit to 12 nautical miles.¹⁸³ The outcome of this extension on the boundary between the two Emirates was that the boundary line extends from a point on the coast and “proceeds seaward on an azimuth of 312° until it intersects the 12-mile arc around Abu Musa and would then follow that arc in a counter clockwise direction.”¹⁸⁴ In addition, the extension of the breadth of the Sharjah territorial sea gives the Emirate the right to explore and exploit Mubarak Oil Field which is situated 9 nautical miles from Abu Musa island. At the same time these extension in Sharjah territorial sea prevents Umm al Qaiwain from doing so. In respect to the two foreign companies, the Sharjah extension for its territorial sea limit to 12 nautical miles caused an overlap in the offshore oil concession areas. This was because Buttes Gas obtained, by the extension of the Sharjah limit, the right to explore the Mubarak oil field. This oil field was located in the Umm al Qaiwain continental shelf area and, consequently, it should have been in the Occidental Petroleum oil concession area, if the extension of the Sharjah territorial sea limit had not taken place.

There were reactions from the parties concerned. The Umm al Qaiwain Government and the Occidental Petroleum Company rejected the Sharjah decree and challenged its validity. The initial reaction of the UK Government was to express its view to the Government of Sharjah that “it was not right for the Ruler of Sharjah to extend his territorial waters in this way.”¹⁸⁵ Iran took advantage of the situation and renewed its claim of ownership over Abu Musa island and its 12-nautical-mile territorial sea. The UK, as a result of the Iranian interference, ceased in its opposition to the Sharjah Government and put pressure on the Umm al Qawaine Government to impose limits on the Occidental Petroleum Company, namely, that it must not operate within the 12-mile limit for Abu Musa.¹⁸⁶ After

¹⁸³ For the text of the Amir of Sharjah Decree, see the *Report of the Trucial States Mediation*, vol. 2, unpublished studies on the matter of Sharjah Territorial Sea and Continental shelf rights, at p. 36 of the report.

¹⁸⁴ See Charney and Alexander, *op. cit.*, n.20, at p.1550.

¹⁸⁵ See *Buttes Gas and Oil Co v. Hammer and another* (no.2)/*Occidental Petroleum Corporation v. Buttes Gas and Oil Co and another*, *All England Law Report* (1975), vol. 2, at p.55.

¹⁸⁶ *Ibid.* The two oil companies engaged into judicial litigation for a period of about ten years. For further discussion on these judicial litigation, see *All England Law Report* (1975), vol. 2, at

the creation of the federation of the UAE, the government of Umm al Qawaine, according to the Government of Sharjah, “acknowledged expressly Sharjah’s exclusive rights in the area within 12 miles of Abu Musa.”¹⁸⁷

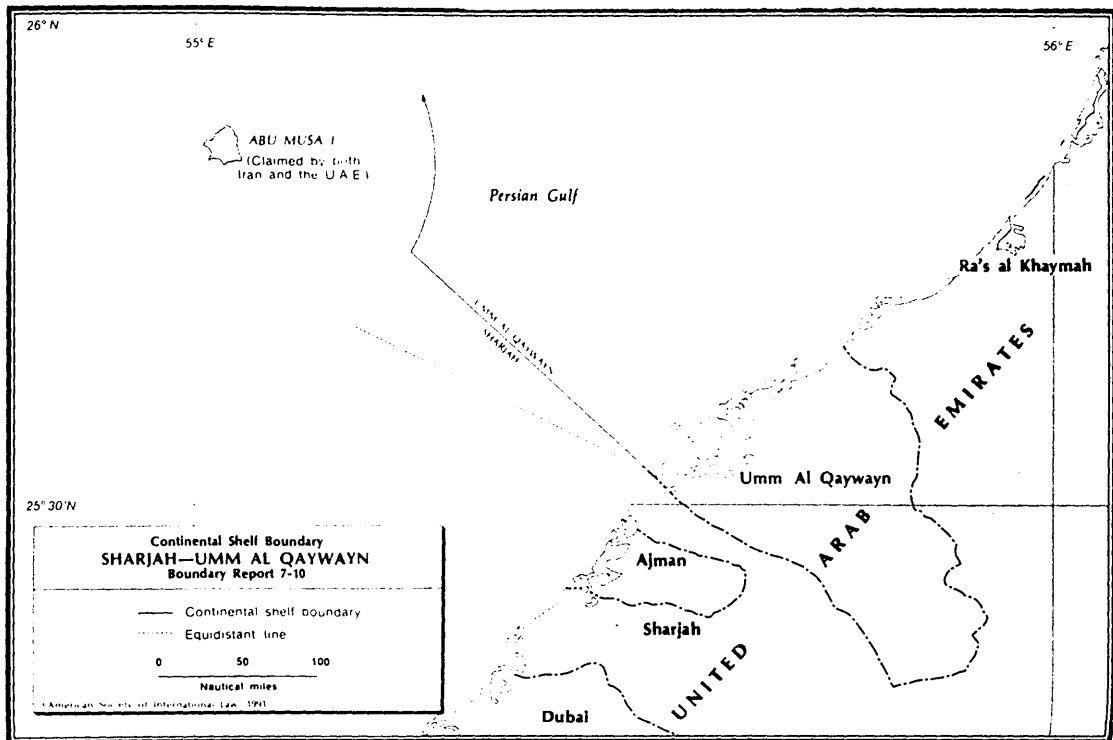


Figure: (15) Sharjah-Umm al Qaiwain boundary line.
Source: *International Maritime Boundaries*, at p.1554.

pp.51-64; 17 *ILM* (1978), at pp.1190-7; 21 *ILM* (1982), at pp.92-108; Al-Baharna, *op. cit.*, n.89, at pp.316-2.

¹⁸⁷ *Dubai/Sharjah Award*, at p. 667. It was reported that Umm al Qawaine would gain a 15% stake in the resources of Mubarak oil field, whereas Sharjah retained a 35% stake and Iran would gain a 50% stake. See the work of the British Institute, *op. cit.*, n. 30, at p.56. Different percentages were given in Al-Ulama, *op. cit.*, n.62, at p.200. For the Iranian interest in Abu Musa island and its share in the oil field, see Chapter Six.

D: Sharjah-Ajman boundaries

The Emirate of Ajman is an enclave of 100 square kilometres. within the Emirate of Sharjah. There is no text available to the public of an existing agreement between the two Emirates. However, the Government of Sharjah in 1964 issued a declaration, in which it accepted a proposal from the British Government for determining its boundary with Umm al Qaiwain and Ajman.¹⁸⁸ No record of a similar declaration from the Ajman Government exists. Finally, the boundaries between the two Emirates, either in the north or the south, would be affected by the presence of the Sharjah island of Abu Musa and its arc of a 12-nautical-mile territorial sea limit.

Summary and Conclusion

The UAE has a complex series of maritime boundary delimitations which arise by virtue of its geographical position as a littoral state encircled by four neighbours. This geographical location raises the need to determine the boundary lines for the UAE territorial sea, contiguous zone, exclusive economic zone, and continental shelf area. Nevertheless, the UAE practice internal and external, indeed the practice of the Gulf States in general, has been exclusively concerned with the delimitation of the continental shelf boundary, without providing specifically for the delimitation of the other three zonal boundaries (territorial sea, contiguous zone and exclusive economic zone). This can be explained, in large measure, by the nature of the Gulf area as one of the worlds' richest seas in terms of offshore petroleum deposits. Hence the delimitation of the continental shelf boundaries and the definition of the offshore resources, or oil concession areas, are extremely important issues for the littoral states in the Arabian Gulf. It was not surprising therefore to find that the proclamations of 1949, asserting

¹⁸⁸ As far as the boundary between Sharjah and Ajman is concerned, paragraphs two and three of the 1964 declaration read: "I further agree that the sea-bed boundary between Sharjah and Ajman in the north shall be a line starting from a point on the coast in Zora...and going out to the sea on a bearing of 304°. I further agree that the sea-bed boundary between Sharjah and Ajman in the south shall be a line starting from a point on the coast in Bu Athum...and going out on a bearing of 310°." For the text of the declarations, see Charney and Alexander, *op. cit.*, n.20, at p.1555.

authority over the sea-bed and subsoil, contained a provision to determine the boundary of the continental shelf area. The Abu-Dhabi Proclamation, for instance, asserted that the boundary of its continental shelf could be “determined more precisely, as occasion arises, on equitable principles, by [Abu-Dhabi] after consultation with the neighbouring states.”

The extend of the remaining undetermined areas in the network of UAE maritime boundaries is not unusual in the Gulf region. There is no state in the Arabian Gulf area (see the map below) which has succeeded in finalizing all its maritime boundaries. Starting from the north of the Gulf, Iraq has undefined maritime boundaries with Iran and Kuwait. Similarly, Saudi Arabia has undefined maritime boundaries with Kuwait, Qatar and the UAE. Qatar has a complex and a sensitive dispute with Bahrain over the ownership of certain islands between them.¹⁸⁹ Iran in the north and north-west of the Gulf has a boundary dispute with Iraq, Kuwait and the UAE. Finally, Oman has an undefined boundary with the UAE.¹⁹⁰

In addition to the foregoing the following points are of general interest. Firstly, the UAE has concluded maritime boundaries’ agreements in various ways. These may be summarized as follows:

- 1- Negotiation that led to bilateral agreement, e.g., the Iran-UAE agreement.
- 2- A decision of an *ad hoc* arbitration that led to agreement between the two parties, e.g., the Dubai-Sharjah agreement of 1985 in adopting the decision of the Court of Arbitration in the *Dubai/Sharjah Award* of 1981.¹⁹¹
- 3- A commission recommendation that led to agreement between the two parties, e.g., Abu-Dhabi-Qatar.¹⁹²

¹⁸⁹ However, the ICJ in its decision of 1995 accepted Qatar’s claim that the Court has jurisdiction to examine the dispute between Qatar and Bahrain. The Court’s decision at para.50.

¹⁹⁰ For further details on the remaining undetermined maritime boundaries in the Arabian Gulf, see Gault, I.T., “Off-shore Boundary Delimitation in the Arabian/Persian Gulf,” *Ocean Boundary Making*, Johnston and Saunders (eds.), Croom Helm, London (1988), at pp.216-9. See also Prescott, V., *The Maritime Political Boundaries of the World*, Methuen, London (1985), at pp.171-3.

¹⁹¹ *Al-Ittihad*, UAE daily newspaper, 24 April (1985).

¹⁹² For a possible explanation of the nature of this commission, see above at pp.164-6.

4- An administrative decision by the British authorities followed by acknowledgement from the parties concerned, which constituted an agreement, e.g., Sharjah-Umm al Qauwain parallel unilateral declarations.¹⁹³

Secondly, notwithstanding the fact that the UAE's determined boundaries were made entirely in respect to the continental shelf area, these boundaries have acted as the boundary for the exclusive economic zone. This is because the boundary of the EEZ, as far as the UAE is concerned, should, according to Article 3 of the UAE Ministry of Foreign Affairs declaration in 1981, coincide with the boundary of the continental shelf.¹⁹⁴ Thirdly, the equidistance method has been used in all the agreements, albeit without express articulation. Fourthly, the Gault and Anderson Committee demonstrates that conciliation can be a useful mechanism for solving boundary disputes.¹⁹⁵ Finally, all the agreements have been bilateral. No trilateral meeting has been held, even to define a tri-point. The UAE-Qatar-Iran tri-point emerged from the Iranian-Qatar agreement which accepted point A in the UAE-Qatar boundary line as the terminal point in their boundary line.

¹⁹³ The Court of Arbitration in the *Dubai-Sharjah Award*, described the decision of the British Government, in the delimitation of the boundaries between some Emirates of the UAE Federation prior to 1971, as administrative. Such a decision was binding on the Emirates concerned by their prior or post consent, and not by the British will. This was because, the Court pointed out that the British Government had no right, during its special relation with the Emirates, "to delimit unilaterally the boundaries between the Emirates and...no British administration ever asserted that it had the right to do so." *Dubai-Sharjah Award*, at p.567, see also pp.568-80.

¹⁹⁴ Article 3 of the UAE Ministry of Foreign Affairs' declaration in 1981, in respect to the exclusive economic zone, reads: The boundary of the EEZ "shall be determined in accordance with the provisions of the agreements concluded by the Emirates members of the Union in connection with their continental shelf. If the Emirates members of the Union have not concluded such agreement, the outer limit of the economic zone of the United Arab Emirates shall extend to the median line every point of which is equidistant from the nearest points of the baseline."

¹⁹⁵ For further discussion on the flexibility of conciliation, see Chapter Seven.

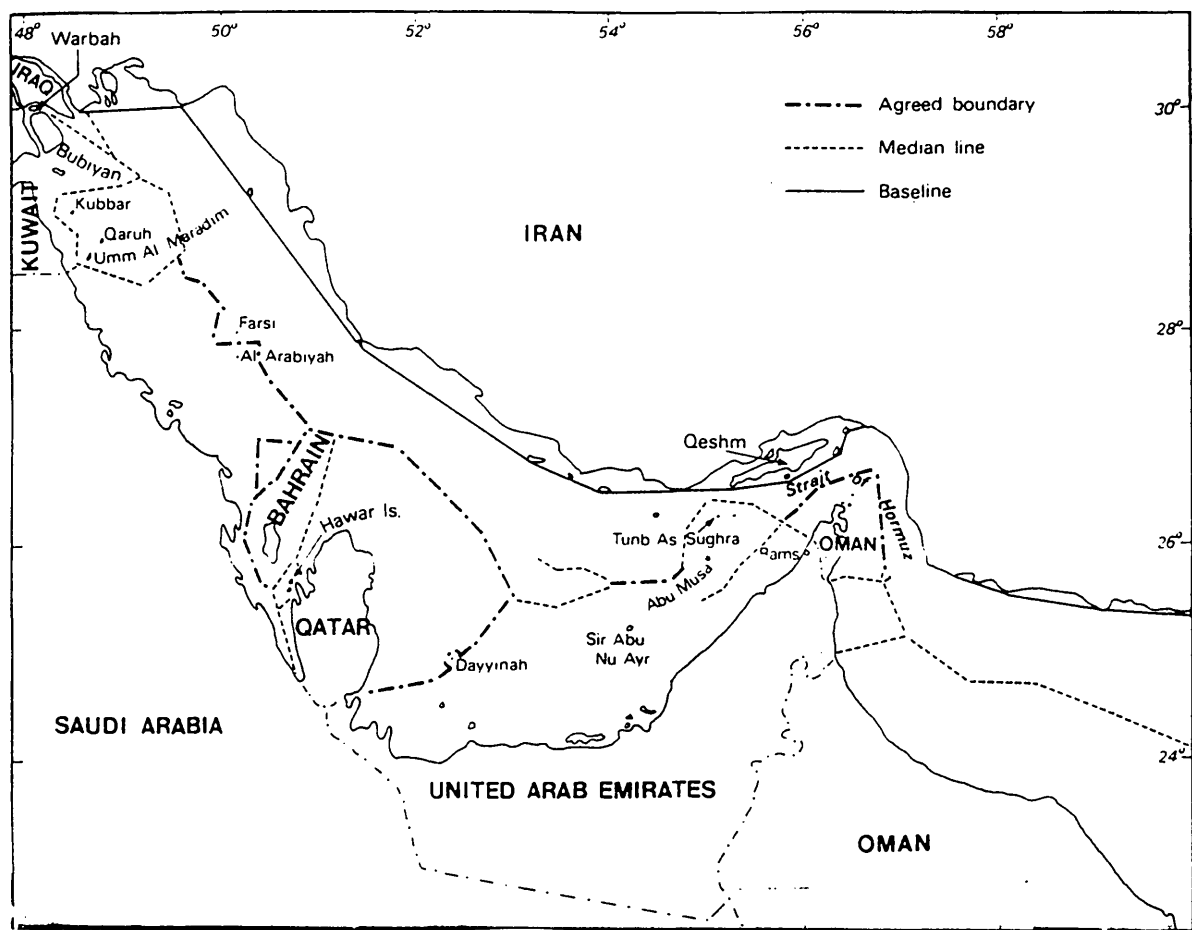


Figure: (16) Agreed and potential boundaries in the Arabian Gulf.
Source: Prescott, V., *The Maritime Political Boundaries of the World*, Methuen, London (1985), at p.170.

The Iranian-UAE maritime boundary

The Iranian-UAE maritime boundary

Iran and the United Arab Emirates are two opposite states whose maritime boundary extends in the Gulf of Oman and the Arabian Gulf for a distance of approximately 214 nautical miles. Boundary matters are often a source of difficulty and political sensitivity between neighbouring states. Thus the delimitation of the boundary with Iran as a major economic and political power in the Gulf region is an important element for the stability of the region in general and for the UAE in particular. In 1974, as we have seen, Iran and UAE agreed to determine part of the boundary between them.¹ However, the agreed continental shelf boundary line extended for only about 39 nautical miles. The remaining undelimited area, of about 175 nautical miles, still needs to be fixed to prevent further problems from arising. The purpose of this chapter is to investigate the reasons that prevent the two neighbouring states from settling their boundaries. It has been divided into two sections: (1) The difficulty of finalizing the boundary between Iran and UAE; (2) Suggestion of a possible boundary line. Before we commence, however, it would be of value to provide a geographical description of the area of delimitation between them, in the Arabian Gulf and the Gulf of Oman.

The area of delimitation between the Iranian and UAE coastlines in the Arabian Gulf extends from the Strait of Hormuz in a south-westerly direction to a point situated midway between Iran, the UAE and Qatar, whose geographical coordinates are latitude 25°31'50"N. and longitude 53°02'05"E.² The width between the two coastlines varies from about 52 nautical miles on the south west

¹ See Chapter Four/Section One.

² This is the trisection point between Iran, Qatar and the United Arab Emirates, see Chapter Four/Section One.

of the Strait of Hormuz to some 160 nautical miles at the centre of the Gulf.³ The average water depth similarly increases gradually from about 10 metres on its south eastern side to about 90 metres where a traffic separation zone has been designated.⁴ On the UAE side the coastline may be described in two parts, A and B:⁵

A: From the Sha'am area on the north-east side to the Ras Ghantût area on the south-west side. This part of the UAE coastline follows a relatively regular south western course, marked only by a number of indentations and coastal islands, e.g. the al-Hamrah island and the as-Siniyyan island.

B: From the Ras Ghantût area to the Rás Ghamés peninsula. In contrast to **A**, this part of the UAE coastline is marked by three geographical features:

- 1- Its general form is a marked concavity.
- 2- The general configuration of the coast is irregular and deeply indented.
- 3- A number of islands are scattered in the vicinity of the coastline, the more considerable ones being Abu Al Abyad island, Abu-Dhabi island, Kisheshah island and Sir Bani Yas island.

On the Iranian side, the coastline, from Hengam island to Lavan island, follows a relatively regular⁶ south-east direction. It is marked by only a few headlands, notably Ra's osh Sha'vari, Ra's-e Kha'rgû, and Ra's-e Yared. Moreover, there are two distinct geographical features in this part of the Iranian coastline. First, the island of Qeshm, lying at the entrance of the Gulf, which is separated from the mainland by only a narrow passage. This Island has been included in the Iranian straight baseline system.⁷ It is approximately 69 miles in length and 7 miles in width. In addition to Qeshm island there are a number of islands of some significance lying opposite the Iranian mainland; these are Sirri,

³ Measured from Lavan Island, on the Iranian coastline, to the Arwes area on the UAE coast.

⁴ See the *Times Atlas and Encyclopaedia of the Sea* (1989), at p.154.

⁵ For illustration, see figure 1.

⁶ The Iranian coastline in this area is rarely deeply indented or fringed by islands. See the United States' note to the UN, January 11, 1994 (USUN 3509/437). Reprinted in the *Limits in the Seas*, Series No.114, at p.30.

⁷ By an Iranian Decree-Law of 21 July 1973. An English translation of this Decree-Law may be found in the UN Office for Ocean Affairs and the Law of the Sea, *The Law of the Sea, Baselines: National Legislation With Illustrative Maps*, New York (1989), at pp.194-6.

Qais and Lavan. Second, the coastline forms a marked convexity between Bandar Moullem and Ra's-e Bostanheh, and a marked concavity on the Bandor-e Moghû area between Ra's-e Bostanheh and Ra's-e Yared.

In the Gulf of Oman the delimitation area between Iran and the UAE is relatively small compared with that in the Arabian Gulf. The UAE coastline in the Gulf of Oman extends in a northern direction for about 50 nautical miles. This coastline is sandwiched between two Omani territories: Dibba in the north and Shanase in the south. This part of the UAE coastline is free from any indentation or islands that may disturb its regular shape. On the opposite side is the Iranian coastline which continues its extension from the Strait of Hormuz up to the boundary with Pakistan for a distance of about 246 nautical miles. This long coastline puts Iran into a position opposite to the UAE and Oman. As far as the boundary with the UAE is concerned, the area between segments 15 and 17, (see the map below)⁸ which extends up to 45 nautical miles in the Iranian straight line system, is opposite the UAE coastline. With the exception of some headlands, such as Ra's al Kûh and Ra's Jâsk, this part of the Iranian coastline is generally straight and smooth.

The width of the delimitation area between Iran and the UAE in the Gulf of Oman increases from about 55 nautical miles in the north west, to about 100 nautical miles in the south east. In the same direction, the average depth increases gradually from about 90 to 250 metres.

In contrast with the area between them in the Arabian Gulf, the delimitation area between the two parties in the Gulf of Oman is free from any islands that could complicate the construction of a median line system between them.

⁸ See also the map reproduced in Section Two of this chapter.

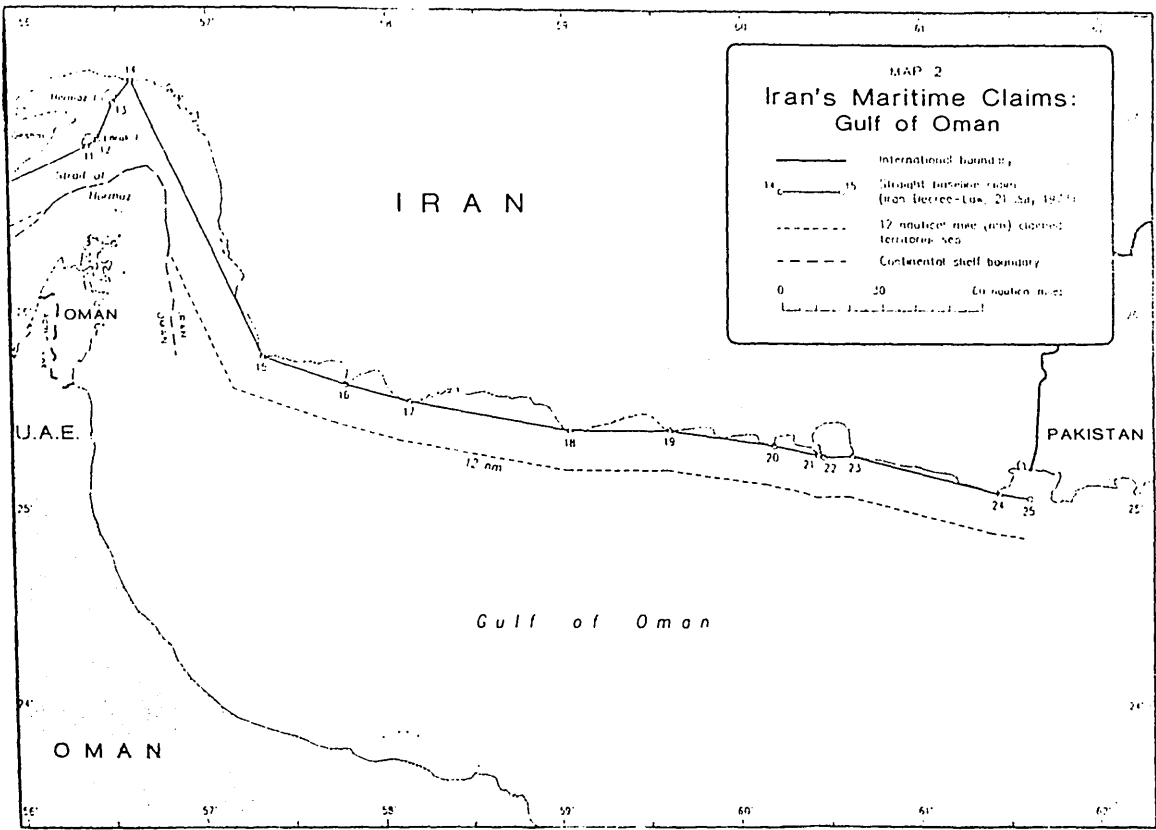


Figure: (17) Iran-UAE boundary in the Gulf of Oman.
Source: *Limits in the Seas*, No.114, at p.7.

Section One

The difficulty of finalizing the boundary between Iran and UAE

As noted above, twenty-five years after the formulation of the UAE federation, its boundary with Iran has not been fully determined.⁹ There may be difficulties preventing the two states from addressing the delimitation question between them. These may stem from geographical features or from the two parties' respective positions on the question of maritime boundary delimitation.

(1) *Geographical circumstances*

In the literature on maritime boundary delimitation the presence of islands is considered among other geographical features as the one often capable of complicating the delimitation process.¹⁰ In the Gulf region islands are scattered in several places. Fortunately, because the Gulf is a semi-enclosed sea with a width of less than 160 nautical miles, the effect of islands in the Gulf States' practices has been restricted to the islands' 12-nautical-mile territorial sea limit.¹¹ Therefore, the number of islands in the Gulf which may have a role to play in continental shelf delimitation is limited to those situated midway between the states concerned. Other islands whose geographical positions are far from the location of the median line area—and situated on the correct side of it—¹² have been disregarded in pre-existing practices in the Gulf.¹³ As far as the Iran-UAE

⁹ This, however, is not the only case in the region. For a general overview on undefined boundaries in the Gulf, see the conclusion to Chapter Four.

¹⁰ Boyle, A.E., "Maritime Boundaries and UNCLOS: Some Current Problems," (unpublished paper) Greenwich Forum, 30 May (1996), at pp.1-2; Bowett, D., *The Legal Regime of Islands in International Law*, Oceana Publications Inc., Dobbs Ferry, New York (1979), at p.152; Evans, M., *Relevant Circumstances and Maritime Delimitation*, Clarendon Press, Oxford (1989), at pp.150-1.

¹¹ With the exception of the Iranian island of Kharag.

¹² Up until now there has been no existing practice in the Gulf area concerning the effect of an island belonging to one state, but situated very close to another state's mainland. In addition to the case of the two Tunbs islands, there is that of the Bahraini island of Hawar situated less than 2 nautical miles off the Qatari coastline.

¹³ See below for examples.

maritime boundary is concerned there are four islands which have, or may have in the future, some influence in the drawing of the boundary line between them. These islands are Sirri, Abu Musa, and the Greater and Little Tunbs islands.

The effect of Sirri island on the median line system between Iran and UAE was settled by the 1974 Iran-UAE continental shelf agreement.¹⁴ The outstanding dispute over the sovereignty of the remaining islands, viz., Abu Musa, and the two Tunbs islands, has impeded the process of delimitation between the two countries. The gap in the boundary line where these islands are present will be termed for convenience the “Islands sector”. Chapter Six will be devoted to examining what possible effect these Islands might have on the UAE-Iran offshore boundary.

In addition to the Islands sector there are two remaining gaps in the UAE-Iran boundary line. First, there is the area which extends from the Qatar-UAE-Iran trisection point to point (1) in the Iran-UAE continental shelf agreement of 1974.¹⁵ For convenience we shall term this gap the “Abu-Dhabi sector.” The second is the area between them in the Gulf of Oman. With the exception of the interests of Oman as a third state,¹⁶ there is neither a geographical difficulty nor a sovereignty dispute in these two sectors between Iran and UAE that could hold up or complicate the delimitation between them, or explain their refraining from addressing the question of their un-delimited boundary in these cases. Indeed, there are several reports, as will be shown, of an existing agreement between Iran and UAE in the Abu-Dhabi sector.¹⁷

(2) Policy positions and pre-existing agreements on maritime boundary delimitation

The problem that may hold back Iran and UAE from fixing the remaining boundary between them, in sectors other than the Islands sector, could spring from the different approach that each has taken to the delimitation of maritime

¹⁴ See Chapter Four/Section One.

¹⁵ For a discussion on Qatar-UAE agreement of 1969 and Iran-UAE agreement of 1974, see Chapter Four/Section One.

¹⁶ This point is addressed in detail below, see pp.233-6 and pp.241-3.

¹⁷ See below at p.244.

boundaries. This could well impede the process of reaching agreement between them. From the literature, one can see that such a possibility would not be unusual. In the *North Sea Cases*, for example, the dispute between Denmark, the Netherlands and the Federal Republic of Germany (FRG) was based on the applicable method for the delimitation of the continental shelf boundary between them. The Netherlands and Denmark argued for the use of the equidistance principle, whereas the FRG rejected such an argument.¹⁸ The three states had to refer the matter to the World Court to identify the principles and rules that were applicable to the delimitation between them.¹⁹ Another example is the dispute between Iran and Iraq over the equidistance method in Shatt-al-Arab. Iraq, as a geographically disadvantaged state argued for applying the concept of equitable principles, whereas Iran insisted on the equidistance method.²⁰

Therefore, it is important to examine Iranian and UAE practices on maritime boundary delimitation to identify the compatibility and the contrast between the two states' position regarding the question of continental shelf delimitation. To do so, it is necessary to have a standard rule of delimitation, then to compare the practice of each party to this rule. International law must be the source of this rule. In the light of the conclusion reached in Chapter Three that international law provides for continental shelf delimitation, and in the absence of agreements to the contrary, a single rule of equidistance/special circumstances under Article 6, or equitable/relevant circumstances under customary law, the two rules are in that both seek to reach an equitable result. There were three aspects where the two parties' respective positions can be compared to the single rule of continental shelf delimitation. Hence, this discussion will be conducted on three different levels: (1) the two parties' policy positions before the UN Conferences on the Law of the Sea; (2) the two parties' delimitation practice; and (3) their relevant domestic legislation

¹⁸ The *North Sea Cases*, at para.15. See also Chapter Three.

¹⁹ Article 1 of the special agreement to submit the two cases to the Court, *ICJ Reports 1969*, at p.6.

²⁰ Amin, S.H., *Political and Strategies Issues in the Persian-Arabian Gulf*, Royston Limited, Scotland (1984), at pp.113-4.

A: The United Arab Emirates' Practices

(a) *The UAE policy position at the UN Conference on the Law of the Sea*

The Third UN Conference on the Law of the Sea was the first Conference on the Law of the Sea in which the UAE had participated. An explanation for the absence of the UAE from participation in the previous UN Conferences on the Law of the Sea was given in Chapter One of this work. In the UNCLOS III the UAE Government supported the equidistance/special circumstances single rule for the delimitation of the EEZ and continental shelf boundary.²¹ Mr. Khalfan, the UAE representative at the 34th meeting of the Conference stated:

Where the coasts of the two States were opposite or adjacent to each other, the median line should be the line of demarcation of the economic zone [and continental shelf], unless otherwise prescribed by mutual agreements, or unless other boundary lines were justified by historic title or other special circumstances.²²

(b) *The UAE's pre-existing practice*

We have seen in the previous chapter that the equidistance line was in general the starting point in the UAE's delimitation agreements concerning the delimitation of its external and inter-emirates maritime boundaries. This equidistance line was modified in some sectors to take account of islands present in the vicinity of the equidistance line, (Abu-Dhabi-Qatar, Iran-UAE); or to take account of the location of oil fields midway between the two states (Abu-Dhabi-Dubai, Qatar-Abu-Dhabi). Proportionality was invoked in the UAE practice to prevent islands from having an excessive weight that might have resulted in disproportionately distorting effects in the delimitation between the two parties (Sharjah-Dubai). To sum up, the UAE's pre-existing internal and external practice in respect of continental shelf delimitation is in general agreement with the rules of international law.²³

²¹ See Chapter Three for more discussion on the single rule of equidistance/special circumstances.

²² *UNCLOS III Official Records*, vol.6, at p.141, para. 37.

²³ A similar conclusion was held by Richard Young after he examined the practice of the Gulf States as a whole; see Young, R., "The Persian Gulf," *New Direction in the Law of the Sea*, vol. 3, Collected Papers, Churchill, Simmonds and Welch (eds.) Oceana Publications Inc., Dobbs Ferry, New York (1973), at p.234.

(c) *The UAE Maritime Legislation*

As has been mentioned previously, in 1949 the Trucial States Emirates declared exclusive jurisdiction over the continental shelf areas adjacent to their coastlines. These declarations contained reference to the concept of equitable principles to determine the boundary of the continental shelf.²⁴ The delimitation of the continental shelf in accordance with equitable principles was discussed in Chapter Three of this work.

In 1969 the Emirate of Sharjah extended its territorial sea to a 12 nautical miles limit.²⁵ The Decree did not address the question of delimitation. One year later a supplementary Decree was issued by the Emirate in which it reclaimed a 12-nautical-mile territorial sea. In relation to delimitation, Article 4 of the supplementary Decree adopted, in the absence of agreement, the median line system as the boundary line for the Emirate's territorial sea.²⁶ In addition to the 1949 continental shelf declarations and the Emirate of Sharjah Decrees, in 1981 the Federal Government of the UAE declared an exclusive economic zone. The boundary of this zone, according to the declaration, should be determined "in accordance with the provisions of the agreements concluded by the Emirates members of the Union in connection with their continental shelf. If the Emirates members of the Union have not concluded such agreement, the outer limit of the economic zone of the United Arab Emirates shall extend to the median line every point of which is equidistant from the nearest points of the baseline."²⁷

²⁴ An English translation of these 1949 declarations may be found in the United Nations Legislative Series *Laws and Regulations on the High Seas*, vol. 1, New York (1951), at pp. 23-9.

²⁵ For the text of the Amir of Sharjah Decree, see the *Report of Trucial States Mediation*, vol. 2, unpublished studies on the matter of Sharjah Territorial Sea and Continental shelf rights, at p. 36 of the report.

²⁶ Article 4 referred to Article 12 of the 1958 Territorial Sea and Contiguous Zone Convention to define the median line system. The text of the Supplementary Decree is reproduced in Al-Baharna, H., *The Arabian Gulf States*, 2nd ed, Librairie De Liban, Beirut (1975), at pp. 402-3.

²⁷ See the UN Office for Ocean Affairs and the Law of the Sea, *The Law of the Sea, National Claims to Maritime Jurisdiction*, New York (1992), Article 3, at p.135.

The UAE Federal Law No. 19 of 1993

In 1993 the Government of the UAE issued a comprehensive ‘Federal Law in respect of the Delimitation of the Maritime Zones of the United Arab Emirates’.²⁸ As far as the delimitation of the UAE maritime boundary is concerned, Article 23 of this Law distinguishes between the case of the territorial sea on one hand, and the case of the contiguous zone and the continental shelf and the exclusive economic zone on the other. For convenience we will adopt this distinction when examining the formula of Article 23.

The Delimitation of the Territorial Sea Boundary

Article 23(1) reads:

1. Where the territorial sea of the State is opposite or adjacent to the territorial sea of another State, the outer limit of the territorial sea of the State shall be the median line.

The provisions of this paragraph differ from the formula in Article 15 of the 1982 Convention. It will be recalled that Article 15 suggested for the delimitation of the territorial sea boundary three possible lines; namely, (1) a line resulting from agreement; (2) a line justified by historical title or other special circumstances; and (3) the median line system. Article 23(1) of the UAE Federal Law provides only one possible solution, that is, the median line. It does not address the concept of special circumstances, which is used as a ground to justify a departure from the median line. It follows that the UAE government has declined to accept any boundary line, for the territorial sea, other than the median line. The case of the Greater Tunb and Lesser Tunb islands which lie at a distance of 15 and 20 nautical miles respectively from the Iranian coastline, could have been in the minds of the UAE legislature when the restriction—not to accept a territorial sea boundary line other than the median line system—was imposed in the Article in question. This being so, the provision of Article 23(1) could create two difficulties for the UAE Government. The first would face the Government

²⁸ An English translation of this 1993 Federal Law may be found in the UN Office of legal Affairs, Division for Ocean Affairs and the Law of the Sea, *The Law of the Sea Bulletin*, No.25, New York, June (1994), at pp. 94-100.

when considering whether to ratify the LOS. At that stage it should give serious consideration to bringing this provision of its domestic legislation in to line with the rules of the Convention. The second difficulty would arise if and when Iran and UAE agreed to seek amicable settlement for the boundary between the two Tunbs and the Iranian coastline. Amicable settlement—as we shall see in Chapter Seven—may be reached, in the absence of agreement, by referring the issue to the World Court applying *ex aequo et bono* adjudication, or to a conciliation commission. In either instance, the outcome of such a form of third-party settlement may not be in harmony with the provision of Article 23(1) of the UAE Law.

Delimitation of the Contiguous Zone, Continental Shelf and EEZ Boundaries

Article 23(2) of the Federal Law reads:

In the absence of an agreement between the State and another opposite or adjacent State, the outer limit of the contiguous zone and the continental shelf and the exclusive economic zone shall be the median line every point of which is equidistant from the nearest points on the baselines.

The language in the first sentence of the paragraph takes on board the fact that the UAE has negotiated boundary agreements with Qatar and with Iran, in determining parts of the continental shelf boundary between the two countries. Further, Article 23(2) is consistent with Article 24(3) of the Territorial Sea and Contiguous Zone Convention of 1958, and with some parts of Article 6 of the 1958 Continental Shelf Convention. The difference between Article 23(2) of the UAE Law and Article 6 of the 1958 Convention is that the former does not address the concept of ‘special circumstances’ to be used as a ground to justify the departure from the median line, whereas the latter does. However, departure from the median line in Article 23(2) of the UAE Law is still possible by negotiated agreement between the UAE and a neighbouring state. Hence, unlike the formula of paragraph 1 of Article 23 of the Federal Law, the UAE is, as a

matter of domestic law, in a position to accept a boundary line different from that of the median line system, where there is an agreement.²⁹

B: Iranian Practice

(a) The Iranian policy position at the UN Conferences on the Law of the Sea

At the First UN Conference on the Law of the Sea of 1958, Iran accepted in principle the draft of Article 72 of the ILC final report on the continental shelf regime. This, however, did not hold Iran back from arguing for amendment to it “to permit some measure of relaxation of the general rule followed in delimiting the boundary”³⁰ in shallow seas such as the Arabian Gulf.³¹

The Iranian proposal was that “where special circumstances so warrant, the median line shall be measured from the high-water mark along the coastline” of the States concerned.³² In order to clarify its objection to the use of the rule of the low-water line in the Gulf, the Iranian delegate went on to explain that:

... when large bodies of water carrying sediment deposited it near the coast and formed extensive mud flats which were exposed at low-water ... it would be almost impossible to identify the low-water line by visual observation or by photography.³³

It may well be, however, that the real reason for Iranian concern about the application of the low-water rule in the Gulf was the fact that “a median line drawn from low-water marks in the Persian Gulf would have been distorted to Iran’s disadvantage since the waters on the Arab side are shallower than those on the Iranian side.”³⁴ As was seen in Chapter Three, the Iranian proposal was defeated, by a vote of 2 in favour and 33 against, with 21 abstentions.³⁵ Iran consequently registered a reservation upon signature to Article 6 of the 1958 Convention.³⁶

²⁹ Therefore, paragraph 2 of Article 23, in general, does not contradict the formula of Article 6 of the 1958 Continental Shelf Convention.

³⁰ MacDonald, C.J., *Iran, Saudi Arabia, and the Law of the Sea*, Greenwood Press, London (1980), at p.179.

³¹ *Ibid.*, at p.178.

³² Docu. A/CONF-13/C.4/L.60, *UNCLOS I Official Records*, vol. 6, at p.142.

³³ *Ibid.*, at p.92.

³⁴ MacDonald, *op. cit.*, n.30, at pp.179-80.

³⁵ *UNCLOS I Official Records*, vol. 6, at p.98.

³⁶ The Iranian reservation was that: “with respect to the phrase ‘and unless another boundary line is justified by special circumstances’ included in paragraphs 1 and 2 of this Article, the Iranian

On the question of the effect of islands in the delimitation process, Iran argued in favour of disregarding in delimitation any island situated beyond the territorial sea limit. In justifying this position Mr. Rouhani, a member of the Iranian delegation, remarked:

the question that arose, however, was how to trace the median line in relation to islands. It was clear that, if they are to be taken into account, serious complications would arise and the benefit of having adopted the median rule would be lost by the difficulty of applying it. It was because such difficulties were always encountered that his delegation believed that the most convenient and most equitable solution was...*not to permit islands situated much further out than the territorial sea to have any influence on the boundary.*³⁷

The Iranian position on the effect of islands changed dramatically, however, at the Third UN Conference on the Law of the Sea. It supported the opposite direction to its earlier position in 1958.³⁸ The new policy can be seen in the various statements of the Iranian delegates to the Conference. Mr. Mir-Mehdi, the Iranian representative, in a statement at the closing session of the Third UN Conference on the Law of the Sea in Montego Bay said that:

islets situated in enclosed and semi-enclosed seas which potentially can sustain human habitation or an economic life of their own but which, owing to climatic conditions, resource restriction or other limitations, have not yet been put to full development, fall within the provisions of paragraph 2 of Article 121, concerning the regime of islands, and therefore have full effect in the boundary delimitation of various maritime zones of the interested coastal States.³⁹

To sum up, Iranian policy regarding the influence of islands in the delimitation process developed in two stages. Initially, the Iranian position, as mentioned, was to support a complete denial of maritime zones for islands that lay beyond the territorial sea limit. This position found no significant support in the First UN Conference on the Law of the Sea. Article 12 of the Territorial Sea and Contiguous Zone Convention, as was mentioned above, provided a different approach: the presence of special circumstances could be used as a ground to

Government accepts this phrase on the understanding that one method of determining the boundary line in special circumstances would be that of measurement from the high water mark." See *Multilateral Treaties Deposited with the Secretary-General Assembly*, UN, New York (1986), at pp. 695-6.

³⁷ Italic added, *UNCLOS I Official Records*, vol. 6, at p.96, para.2, see also para.69. And see Amin, S., H., "Law of the Continental shelf: The Gulf Example," 27 *NILR* (1980), at p.341.

³⁸ A possible explanation for the change in the Iranian position is given below.

³⁹ *UNCLOS III Official Records*, vol.17, at p.106, para.73. A similar position was stressed early at the Ninth session by Mr. Farivar, the Iranian delegate, see *Ibid.*, vol.14, at p.42, para.2.

justify the departure from the median line. Moreover, the early Iranian position finds no support in Iranian practice subsequent to the 1958 UN Conference on the Law of the Sea.⁴⁰ This was especially true in the Iranian agreements with Saudi Arabia of 1968, and with the UAE and Oman of 1974. In these agreements islands were taken into account, even though they lay in the median zone area. This resulted in an adjustment of the median line in each case.⁴¹

Not unexpectedly, Iran espoused a different approach at the Third UN Conference on the Law of the Sea. This shift in Iranian policy, calling for islands to be considered special circumstances, may have been because Iran wanted its policy position to coincide with its actual practice in the region. Furthermore, the development of the International Law of the Sea could not support a total denial of islands affecting the delimitation just because they lay beyond the 12-nautical-mile territorial sea limit.⁴² In addition, during the First UN Conference Iran had no *de facto* control over the disputed Islands. This was completely changed during the period of the Third UN Conference, when Iran controlled the Islands as a result of its invasion of them in 1971.⁴³ Finally, and a direct result of that control, Iran was anxious to claim in a possible future delimitation a role for islands lying beyond the median line (e.g. Abu Musa island) or beyond its territorial sea limit (e.g. the two Tunbs islands).

(b) Pre-existing Iranian agreement on maritime boundary delimitation

The length of the Iranian coastline in the Gulf of Oman and the Arabian Gulf is approximately 756 miles from Pakistan in the east to Iraq in the north-west. It is adjacent or opposite to eight different states; namely, Pakistan, Oman, the UAE, Qatar, Bahrain, Saudi Arabia, Kuwait and Iraq. There are ten international offshore boundaries, some of which, as we shall see, have been dealt with, while others are yet to be addressed. These boundaries in a counter-clockwise direction are: in the east, Iran's adjacent boundary with Pakistan, to the west an opposite

⁴⁰ Amin, *op. cit.*, n.37, at p.341.

⁴¹ See below.

⁴² For further discussion on the effect of islands in maritime boundary delimitation, see Chapter Six/Section Two.

⁴³ See below at Chapter Six/section One.

boundary with Oman and the UAE. In the Strait of Hormuz Iran again has a boundary with Oman. Proceeding to the west and north-west, the Iranian boundaries' network in the Arabian Gulf begin with the boundaries with the UAE, Qatar, Bahrain, Saudi Arabia and Kuwait. The series of Iranian maritime boundaries comes to an end with an adjacent boundary with Iraq in the north-west direction. From 1968 until 1974 Iran succeeded in concluding five international agreements with neighbouring states to determine parts of its continental shelf boundary.

The first Iranian-Arab agreement was with Saudi Arabia.⁴⁴ This resolved a long-standing territorial dispute between Iran and Saudi Arabia concerning the sovereignty of the Al-Arabiya and Farise islands.⁴⁵ Both Islands are situated on the Saudi Arabian side of the median line. In April 1964 the two parties agreed to set up a joint committee of experts, and to submit to it their offshore boundary dispute. According to Amin, an Iranian scholar, the committee of experts' mandate was to recommend "an equitable basis for resolving the dispute. ... Accordingly, the two states initialled an offshore boundary agreement on December 13, 1965."⁴⁶

The agreement allocated Al-Arabiya island to Saudi Arabia and Farise island to Iran. In respect of the delimitation of the continental shelf between them, the agreed boundary line was a modified median line to take into account the presence of Farise, Al-Arabiya and Kharg islands. The two contracting parties agreed to give Farise and Al-Arabiya islands in the central sector full effect territorial sea limit, and to construct a local median line where the Islands' territorial sea limit would overlap.⁴⁷ This has resulted in the adjusting of the boundary line between the two parties' mainlands to take an **S**-shape in the two

⁴⁴ For the text of the agreement, see *International Maritime Boundaries*, Charney and Alexander (eds.), Martinus Nijhoff Publishers, the Netherlands (1993), at p.1520.

⁴⁵ Ibid., at p.1519.

⁴⁶ Amin, S.H., *International and legal Problems of the Gulf*, Middle East and North African Studies Press Limited, London (1981), at p.102. It is interesting to note that no reference was given by the author.

⁴⁷ Article 1 of the agreement. The agreement is summarized in Al-Baharna, *op. cit.*, n.26, at p.310.

Islands area. To the north they agreed to give the Iranian island of Kharg, 17 nautical miles off the Iranian coastline, a half-effect continental shelf limits—the first time this method was utilised in the practice of continental shelf delimitation.⁴⁸ In the Gulf the treatment of Kharg island remains the only case to date where an island has been given continental shelf effect. In the next chapter we will examine the method of allocating half-effect in a more detailed form; in the present context it is sufficient to assert that the “half-effect principle is a trade off between considering the island as part of the mainland (full-effect) or completely ignoring the island (no-effect).”⁴⁹ The reason for this special treatment was probably “because the general outlines of the mid-Gulf oil fields were known and concessions had been granted.”⁵⁰

The 1965 agreement, however, was never ratified because “the Iranian concessionaire discovered a petroleum structure situated largely on the Saudi side of the boundary [line] determined by the agreement.”⁵¹ An effort to solve the problem was made, and Saudi Arabia eventually agreed to revise the boundary line on the basis of “an equitable division of the oil in place.”⁵² The new line, as reproduced below, extends over 16 turning and terminal points for a distance of approximately 139 nautical miles. The difference between the 1965 line and the new line of 1968 is limited to the section that extends from point 8 to point 14. The new line between these two points runs in zigzag fashion to divide in an equitable manner the oil fields discovered in the area between Iran and Saudi Arabia.⁵³ This revised part⁵⁴ of the boundary line contributed to “a substantial increase in Iran’s share of estimated oil reserves.”⁵⁵

⁴⁸ Bowett, *op. cit.*, n.10, at p.140.

⁴⁹ *Limit in the Seas*, Series No.24, July (1970), at p.7.

⁵⁰ El-Hakim, A., *The Middle Eastern States and the Law of the Sea*, Manchester University Press, Manchester (1979), at p.95.

⁵¹ See Charney and Alexander, *op. cit.*, n. 44, at p.1520. See also Amin, *op. cit.*, n. 46, at p.103; Al-Baharna, *op. cit.*, n.26, at pp.351-3; Young, R., “Equitable Solutions for Offshore Boundaries: The 1968 Saudi Arabia-Iran Agreement,” 64 *AJIL* (1970), at p.154; *Limit in the Seas*, Series No.24, July (1970), at p.3.

⁵² Young, *Ibid.*, at p.154.

⁵³ *Ibid.*, at p.155. Ratifications of the 1968 agreement were exchanged on January 1969, “at which time the Agreement came into force.” *Limit in the Seas*, Series No.24, July (1970), at p.1

⁵⁴ Which “gave only a slight net gain in seabed area to Iran.” See Young, *op. cit.*, n.23, at p.155.

⁵⁵ *Ibid.* See also Charney and Alexander, *op. cit.*, n. 44, at p. 1522.

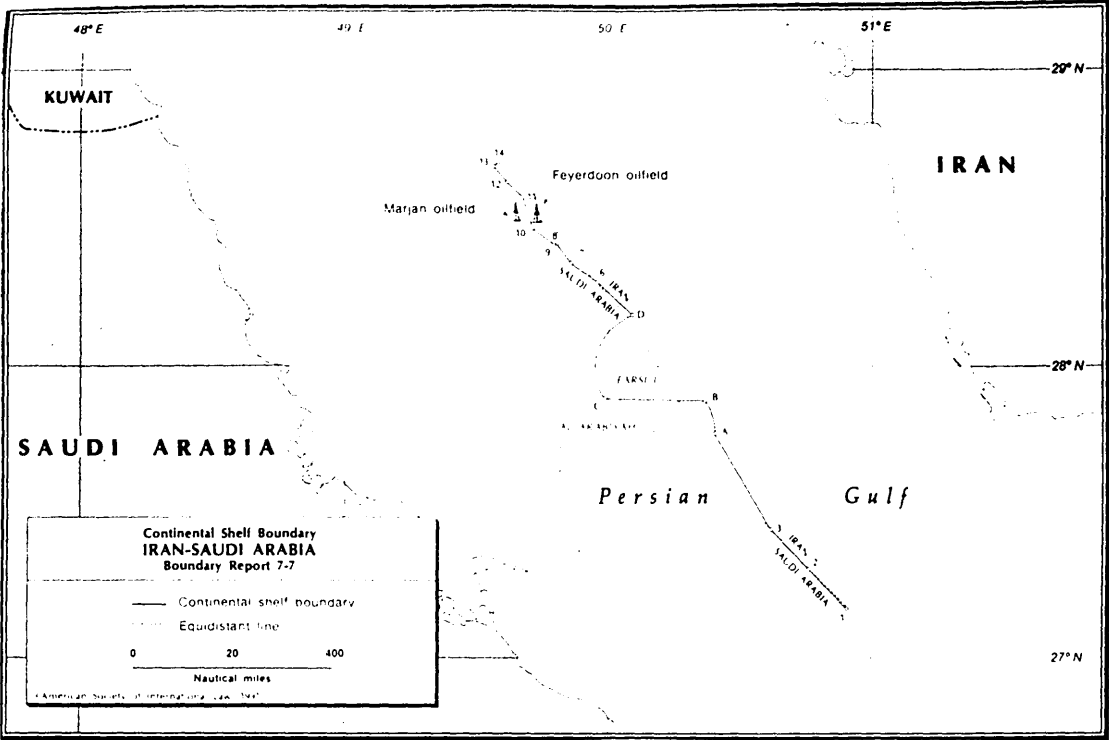


Figure: (18) Iran-Saudi Arabia boundary.
Source: *International Maritime Boundaries*, at p.1525.

Following the conclusion of the Iran-Saudi Arabia agreement in 1968, Iran moved to delimit its offshore boundary with Qatar, Bahrain, Oman and UAE.⁵⁶ In each agreement the contracting parties appear to have drawn a median line between the two opposite coastlines. In the Iran-Qatar continental shelf agreement of 1969, the boundary consists of a geodetic line connecting six points and extended for a distance of about 131 nautical miles.⁵⁷ No island is situated midway between Qatar and Iran⁵⁸ that could require adjustment in the median line between them.⁵⁹ In a similar manner, the boundary line between Iran and Bahrain, which runs in a straight line for a distance of 28.28 nautical miles between four points.⁶⁰

In the Strait of Hormuz the boundary between Iran and Oman extends for a distance of 124.85 nautical miles. As seen from the map reproduced below, the location of the Iranian island of Larak⁶¹ in this narrow area resulted in the shifting of the boundary line between points 9 and 10, towards Oman. This was in order that the boundary line be consistent with the 12 nautical miles arc drawn from Larak Island.

The effect of the agreed boundary line on third states was shown in the Iranian continental shelf agreements with Qatar, Bahrain and Oman. In these agreements, at least one terminal point in the boundary line was not described in a precise way. This was because one of the contracting parties had an undefined boundary with a third state. For example, in the Iran-Qatar agreement point 1, the north-west terminal point, was not described in geographical co-ordinates. Rather it was referred to as “the westernmost point on the westernmost part of the northern boundary line of the continental shelf appertaining to Qatar formed by a

⁵⁶ For full discussion on the Iran-UAE agreement, see Chapter Four.

⁵⁷ See Charney and Alexander, *op. cit.*, n.44, at p.1511. See also Al-Baharna, *op. cit.*, n.26, at pp.353-4.

⁵⁸ This does not mean that there were no islands between the two mainlands, e.g., Qatar’s island of Halul. However, the general tendency in Gulf States’ practice is to disregard in delimitation islands situated far from the median line, but on the correct side of it. See below.

⁵⁹ See Charney and Alexander, *op. cit.*, n. 44, at p. 1513.

⁶⁰ *Ibid.*, at pp.1480-4. See also Al-Baharna, *op. cit.*, n.26, at pp.354-5.

⁶¹ Included in the Iranian system of a straight line.

line geodetic azimuth $278^{\circ}14'27''$ west from point 2 below.⁶² The reason for this is that Qatar had no offshore boundary agreement with Bahrain. Hence it was impossible to select a tripoint between Qatar, Bahrain and Iran.⁶³ A similar provision was agreed upon by Iran and Bahrain in respect of the eastern terminal point in their boundary line,⁶⁴ and in the Oman-Iran agreement in regard to the two terminal points in the boundary line between them in the Strait of Hormuz.⁶⁵

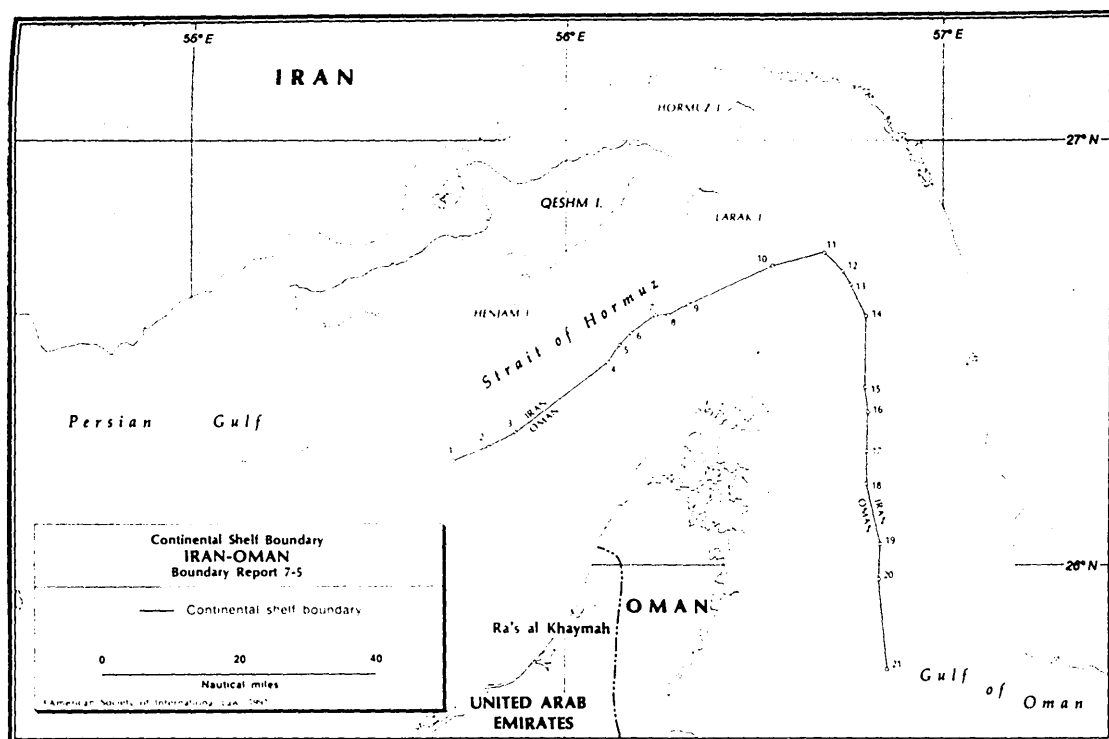


Figure: (19) Iran-Oman boundary.

Source: *International Maritime Boundaries*, at p.1507.

⁶² Article 1 of the agreement.

⁶³ This is in contrast with point 6 which is the southern terminal point of the Qatar-Iran boundary line. The geographical co-ordinate of this point is consistent with the position of the Qatar-Abu-Dhabi (UAE) boundary line terminal point as constructed in the two parties' agreements of 1969. Point 6 therefore, is an equidistance tripoint between Qatar, Iran and UAE. See Chapter Four for more details on this agreement.

⁶⁴ Where a tri-junction point with Qatar needs to be designated.

⁶⁵ Where two tri-junction points with the UAE need to be designated.

Such an easy, straightforward solution, to avoid the involvement of a third state in the delimitation by preserving its actual or potential claim, is not an unusual in state practice. For example, in the Greece-Italy continental shelf agreement of 1977, the two parties agreed to stop the boundary line before reaching a possible tri-junction point between them and third states in the region. Article 1 paragraph 3 declares that:

The Contracting Parties have agreed that for the moment such delimitation shall not extend northward beyond point 1 or southward beyond point 16. This delimitation shall subsequently extend in both directions to the points of intersection with the zones of the continental shelf belonging to the respective neighbouring countries.⁶⁶

Ending the boundary line before the area where a third state may have a claim as a technique to avoid its involvement at the time of constructing the boundary line was adhered to by the World Court in the *Libya v. Malta Case* of 1985. In this case Italy, the third state, informed the Court that it had an interest in part of the delimitation area between Libya and Malta that could be affected by the Court judgement. Thus it requested permission from the Court to intervene in accordance with Article 62 of the ICJ Statue.⁶⁷ The Court rejected the Italian request,⁶⁸ but emphasized the need to take into account the legal interests of Italy.⁶⁹ To do so, the Court decided to limit the scope of the delimitation area to that where the Italian claims would not be affected.⁷⁰

The negative result of stopping the boundary line before reaching an area where a third state may have interest is that it does not provide a complete solution to the boundary question between the two contracting parties. As we

⁶⁶ For the text of the agreement, see Charney and Alexander, *op. cit.*, n.44, at p.1599. For further examples, see Colson, D., "The Legal Regime of Maritime Boundary Agreements," *International Maritime Boundaries*, Charney and Alexander (eds.), Martinus Nijhoff Publishers, the Netherlands (1993), at pp.62-3.

⁶⁷ For further reading on the scope of Article 62, see Greig, D.W., "Third Party Rights and Intervention Before the International Court, 32 *VJIL* (1991-92), at pp.287-376; Rosenne, S., *Intervention in the International Court of Justice*, Martinus Nijhoff Publishers, the Netherlands (1993).

⁶⁸ Mainly "because both disputing parties opposed it." See Degan, V. D., "Equitable Principles in Maritime Delimitations," *International Law at the Time of its Codification*, Essay in Honour of Roberto Ago, vol. 2, Milano-Dott.A. Giuffrè Editore (1987), at p.121.

⁶⁹ *Application by Italy for Permission to Interfere in Libya v. Malta Continental Shelf Case*, at para.41; see also para. 47.

⁷⁰ *Libya v. Malta Case*, at para.21. See also Chapter Three for more discussion on the interest of a third state as relevant circumstances, and the reaction of Professor Weil to the Court decision.

shall elaborate at a later stage, the parties involved need in the future to enter into a new round of negotiations in order to close the gaps left as a consequence.

(c) Iranian Maritime Legislation

In general terms it can be said there have been five Iranian Acts with respect to offshore zones.⁷¹ The earliest was the Act of 19 July 1934 concerning the breadth of territorial waters and the zone of supervision. It did not address the question of delimitation.⁷² On 19 June 1955 the Iranian Cabinet adopted an Act concerning the sovereignty of Iran over the continental shelf area.⁷³ Article 3 addresses the case where a dispute arises over the limits of Iran's continental shelf area. In such a case the dispute was said to be "settled in conformity with the rule of equity."⁷⁴ The Iranian Act went on to stress that the Iranian government would "take the necessary steps for the settlement of any [continental shelf] disputes through diplomatic channels."⁷⁵

The Act of 1934 was amended by the Act of 2 April 1959.⁷⁶ This amendment extended the breadth of the Iranian territorial sea to 12 nautical miles. In so far as delimitation is concerned, the amended Act provides for the median line system to be used, in the absence of agreement, as the boundary line between the Iranian coast and these of other neighbouring states.

On 30 October 1973 the Iranian Cabinet proclaimed an exclusive fishing zone. The outer limit of this zone, according to the proclamation, should correspond to the outer limit of the continental shelf boundary as specified in the agreement concluded between Iran and neighbouring states. However, where there were no agreements to determine the boundary of the Iranian Continental

⁷¹ In addition, Iran issued a Decree on 21 July 1973 to establish a baseline. For the text of the Decree, see the Office for Ocean Affairs and the Law of the Sea, *The Law of the Sea, Baseline: National Legislation with Illustrative Maps*, UN, New York (1989), at p.194.

⁷² An English translation of this 1934 Act may be found in the UN Legislative Series, *Laws and Regulations on the Regime of the High Seas* (1951), at p.81.

⁷³ An English translation of Articles 1 and 2 of the 1955 Law may be found in the UN Office for Ocean Affairs and the Law of the Sea, *The Law of the Sea, National Legislation on the Continental Shelf*, New York (1989), at p.134.

⁷⁴ See MacDonald, *op. cit.*, n.30, at p.125.

⁷⁵ Article 3 of the of the 1955 Law was reproduced in *Ibid.*, at p.125.

⁷⁶ An English translation of this 1959 Law may be found in the UN Legislative Series, *National Legislation and Treaties Relating to the Law of the Sea*, New York (1974), at pp.10-1.

shelf, the outer limit of the EFZ should be, unless otherwise agreed, the median line.⁷⁷

The Iranian Marine Law of 1993

On 2 May 1993, the Iranian cabinet enacted an 'Act on the Marine Areas of the Islamic Republic of Iran'.⁷⁸ Articles 4 and 19 of this Act are relevant to the present discussion. Article 4 reads:

Wherever the territorial sea of Iran overlaps the territorial seas of the States with opposite or adjacent coasts, the dividing line between the territorial seas of Iran and those States shall be, unless otherwise agreed between the two parties, the median line...

Article 19 reads:

The limits of the exclusive economic zone and the continental shelf of the Islamic Republic of Iran, unless otherwise determined in accordance with bilateral agreements, shall be a line every point of which is equidistant from the nearest point on the baselines of two states.

Articles 4 and 19 stress the fact that Iran is willing to negotiate an appropriate boundary line with neighbouring states. The formula in these two articles, though they contain some differences in language, coincide in practice, viz., in the absence of an agreement between Iran and one of its neighbouring states, the boundary line between the two countries is the median or the equidistance line.

To sum up, the influence of the Truman Proclamation of 1945 and other Gulf States' Declarations of 1949 was manifested in the Iranian legislation, as far as the question of continental shelf boundary delimitation is concerned, in the adoption of the rules of equity in Article 3 of the Act of 1955. This, like other Gulf States' continental shelves, leaves the Iranian continental shelf without a clear boundary in cases where no agreement has been concluded. In addition, by referring to the rules of equity for the delimitation of the continental shelf Iran has indicated the lack of a preference for the equidistance line enunciated in the ILC report of 1953. Indeed, at the first UN Conference on the Law of the Sea of 1958. Iran, as noted, registered a reservation to Article 6 of the Geneva Convention on the Continental Shelf of 1958. This however was changed.⁷⁹

⁷⁷ An English translation of this 1973 proclamation may be found in the UN Legislative Series, *National Legislation and Treaties Relating to the Law of the Sea*, New York (1976), at pp.334-5.

⁷⁸ An English translation of this 1993 Marine Law may be found in the US Department of State, *Limits in the Seas*, Series No.114.

⁷⁹ Like its position regarding the effect of islands in continental shelf delimitation.

Article 19 of the 1993 Marine Law provided, unless otherwise agreed, the equidistance line for the delimitation of the continental shelf and the EEZ boundaries.

The compatibility and the contrasts between the practices of the two states

Although Iran and the United Arab Emirates are not parties to the 1958 Continental Shelf Convention, the tendency to follow the formula of Article 6 is shown in their agreements.⁸⁰ The equidistance line, as seen above, was the starting point in almost all of the delimitation agreements.⁸¹ Where an island is close to the median line zone, the island's full effect territorial sea limit has been preserved. This, as in the case of the Sirri and Larak islands, has resulted in the creation of an arc in the boundary line. But where an island is situated far from the median line—though on the correct side of the line—it has been ignored in the delimitation, and a straight line drawn. The case of the Qatar island of Halul may serve as an example. Situated about 28 nautical miles from the median line, it was disregarded in the delimitation between Iran and Qatar in respect of the continental shelf boundary.⁸²

In addition to the presence of islands, the equidistance line has been modified in Iranian and UAE agreements so as to define an oil field situated close to the equidistance line.⁸³ In the Iran-Saudi Arabia agreement, for example, the boundary line (between points 8 and 14) was modified to give each party an equal share of the Marjan-Feyerdoon oil field.⁸⁴ Similarly in the Qatar-UAE (Abu Dhabi) agreement of 1969, as was seen in Chapter Four, the two contracting parties selected a point (point B) independently of any consideration of the

⁸⁰ The same is true in respect of other Gulf States' practice.

⁸¹ Young, *op. cit.*, n. 23, at p.233; Amin, *op. cit.*, n.37, at p.345; Alexander, L.M., "Persian Gulf Maritime Boundaries," *International Maritime Boundaries*, Charney and Alexander (eds.), Martinus Nijhoff Publishers, the Netherlands (1993), at p.315; El-Hakim, *op. cit.*, n.50, at pp.130-1; MacDonald, *op. cit.*, n.30, at p.140; Gault, I.T., "Offshore Boundary delimitation in the Arabian/Persian Gulf," *Ocean Boundary Making*, Douglas M. Johnson and Phillip M. Saunders (eds.), Croom Helm, New York (1988), at pp.221-2.

⁸² Young, *op. cit.*, n.23, at p.233.

⁸³ Amin, *op. cit.*, n. 37, at p.346; Young, *op. cit.*, n. 23, at pp.233-4.

⁸⁴ See above at p.231.

equidistance principle, so as to coincide with the location of the al-Bunduq oil field.

The similarity of the pre-existing agreements of the two parties is reflected in some part in their recent maritime legislations. As far as the continental shelf and the EEZ boundary delimitation are concerned, both have adopted in principle the median line rule. This, however, would not prevent either of them from entering into a bilateral agreement which employed a different method. Such a provision, as mentioned earlier, is similar in effect to the single rule of equidistance/special circumstances. Article 4 of the Iranian Act of 1993 adopted a similar provision in respect of the delimitation of the Iranian territorial sea boundary.

However, the issue of territorial sea delimitation was addressed differently in Article 23(1) of the UAE Law of 1993. This, as we have seen, did not provide the UAE government with an escape clause: “unless otherwise agreed between the two parties”, to justify a departure from the median line. It follows that the UAE is under a domestic legal obligation not to agree to anything other than the median line. This limitation may be the source of some difficulty⁸⁵ were the UAE and Iran to seek a amicable settlement⁸⁶—that not necessary to be consistent with the provision of Article 23(1) of the UAE Law—for the territorial sea boundary between the UAE’s islands of Tunb⁸⁷ and the Iranian island of Qeshm.

With the exception of this difficulty, which is limited as far as the UAE-Iran boundary is concerned to the Tunb islands’ territorial sea boundary, Iran and the UAE’s pre-existing offshore agreements, their policy position at UNCLOS III, and their latest maritime laws, present no problems that might impede the finalizing of the continental shelf boundary between them.

In summary, the delimitation areas between Iran and the UAE in both the Gulf of Oman and the Abu-Dhabi sectors are free from any unusual geographical circumstance and from disputes over the sovereignty islands situated between

⁸⁵ For further discussion, see above.

⁸⁶ For further discussion on the method of amicable settlement and objective justice, see Chapter Seven.

⁸⁷ As when Iran agreed to withdraw its forces from the occupied Islands and let the UAE re-exercise its sovereignty over the Islands. See Chapter Six for further examination on the effect of these Islands upon the two states’ offshore boundaries.

them. As regards their respective legal policies there is, as suggested, a degree of consistency. On this bases, it is possible to assert that the boundary between Iran and the UAE in both the Gulf of Oman and the Abu-Dhabi sectors poses no particular geographical or legal difficulties that would complicate or preclude the delimitation of the continental shelf boundary between them. This is in contrast to the situation in the Islands' sector. In the next chapter the UAE-Iran maritime boundary in that area will be discussed in greater detail. Furthermore, in Chapter Seven, an attempt will be made to recommend the use of certain mechanisms which would help to facilitate a solution to the dispute between the two states over the Island's sovereignty. In the remaining part of this chapter we shall investigate a possible boundary line between Iran and UAE in the Gulf of Oman and the Abu-Dhabi-Iran sectors.

Section Two

A possible boundary line between the two parties in the Gulf of Oman Sector and the Abu-Dhabi-Iran Sector

(1) *Gulf of Oman sector*

The delimitation area between Iran and UAE in the Gulf of Oman, as seen in the earlier geographical description, is free from any unusual features that may complicate the delimitation between them. The median line system bisecting the area is an equitable boundary line. Support for the use of the median line in such a circumstance is mirrored in state practice, including that of the UAE and Iran. Fortunately, as mentioned above, the international case law confirms the postulation of the median line as leading *prima facie* to an equitable result.⁸⁸

There is, however, a difficulty which will face Iran and UAE in determining the two terminal points of this median line; the lack of agreement between Oman and the UAE over their adjacent offshore boundaries. Oman and UAE, as seen in the map reproduced below, have an adjacent boundary in three different areas: one in the Arabian Gulf and two in the Gulf of Oman. A straightforward solution would be to follow the practice of other Gulf states in dealing with such an issue. The Iran-Oman agreement of 1974 may provide a practical solution for the uncertainty of the location of two tri-section points. Iran and Oman in their agreement of 1974 managed to solve the matter of determining the location of the two terminal points of their agreed boundary line:

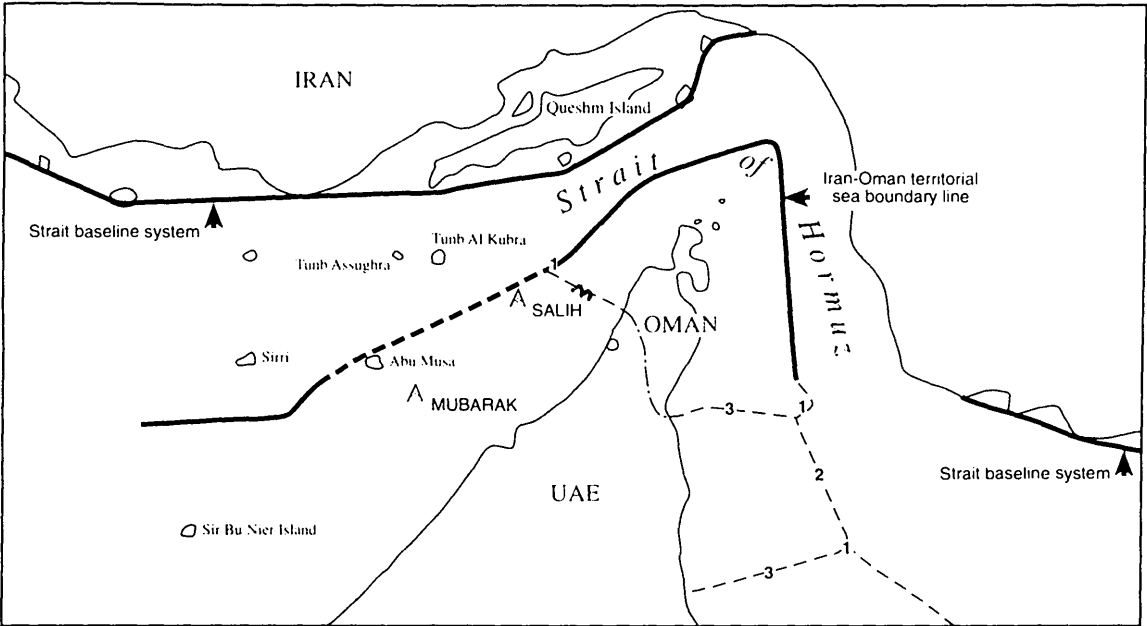
Point (1) is the most western point which is the intersection of the geodetic line drawn between point (0) having the co-ordinates of 55°42'15" E 26°14'45" N and point (2) having the co-ordinates of 55°47'45" E 26°16'35" N with the lateral offshore boundary line between Oman and Ras Al-Khaimah.⁸⁹

Adopting such a technique would help Iran and the UAE to work out the only obstacle which appears to prevent them from addressing the delimitation question

⁸⁸ See Chapter Three/Section One.

⁸⁹ Similar language was used in respect of a point (22), the second terminal point in the boundary line.

in the Gulf of Oman area. On the other hand this suggested treatment, as mentioned earlier, would result in two gaps needing to be addressed in the future.



- 1 A possible trisection point between Iran-Oman-UAE.
- 2 A possible median line between Iran and UAE.
- 3 A possible equidistance line between Oman and UAE.

Figure: (20) Iran-UAE boundary in the Gulf of Oman sector and the interest of Oman as a third state.
Source: The Author.

An example of such an instance is the boundary between Poland, Sweden and the former USSR *inter se*. In 1985, Poland and the former USSR concluded an agreement to determine the offshore boundary between them. The boundary line was ended about 3 nautical miles short of a possible former USSR-Poland-Sweden tri-junction point.⁹⁰ Sweden and the former USSR in 1988 signed an agreement to define the maritime boundary between them. In a manner similar to the first agreement, the boundary line here also stopped before the possible location of a tri-point with Poland.⁹¹ One year later Poland reached an agreement with Sweden on the maritime boundary between their respective coastlines. Due to the lack of agreement on the location of the tri-point, no precise terminal point was laid down for the boundary between them.⁹²

In order to close the gap between the three boundaries, Poland, Sweden and the former USSR had to enter into a further round of negotiations. On 30 June 1989 the three states reached an agreement to eliminate the gap between them by selecting a tri-junction point between their respective boundaries.⁹³

An alternative solution to ending the boundary line short of the tri-junction point would be for Iran and UAE to invite Oman into tri-lateral negotiations. Such a suggestion would end the boundary question, and would save the need to re-enter into future negotiations. There have been a number of examples in state practice where a tri-lateral negotiation has been resorted to and where agreement has been reached. The Indonesia-Malaysia-Thailand agreement of 1971 may be cited as an example. In this instance, the three contracting parties defined the tri-junction point between their maritime boundaries. They then closed the gaps between the tri-junction point and the boundary between: (1) Indonesia and Malaysia;(2) Indonesia and Thailand, as defined at an earlier stage in a bilateral agreement.⁹⁴ Finally, they drew the boundary between Malaysia and Thailand.⁹⁵

⁹⁰ Article 2 of the agreement. For the text of the agreement, see Charney and Alexander, *op. cit.*, n. 44, at p. 2056.

⁹¹ *Ibid.*, at p. 2063.

⁹² Article 2 of the agreement; see *Ibid.*, at p. 2086.

⁹³ *Ibid.*, at pp.2103-4.

⁹⁴ For the text of the Indonesia and Thailand agreement of 1971, see *Ibid.*, at pp. 1462-3; For the text of the Indonesia and Malaysia agreement of 1969, see *Ibid.*, at p.1025.

⁹⁵ Article 1 paras. 1-4 of the 1971 tri-lateral agreement, see *Ibid.*, at pp.1452-3.

(2) Abu-Dhabi-Iran sector

The Abu-Dhabi-Iran sector is regarded as an area where an agreement needs to be reached to determine the continental shelf boundary between the UAE and Iran in this sector. This understanding is widely reflected in the majority of legal texts dealing with maritime boundary delimitation in the Gulf,⁹⁶ mostly because no existing text of a treaty has ever been released to the public. However, there is some indication to suggest that Abu-Dhabi prior to the federation appears to have reached some understanding with Iran over the continental shelf boundary between them. For example, the London journal *Arab Report and Record* reported in September 1971 the announcement of the Abu-Dhabi Oil and Industry Minister that “Abu-Dhabi and Iran had initialled an agreement demarcating the continental shelf dividing their territories beneath the waters of the Gulf.”⁹⁷ This announcement was picketed up by Amin, an Iranian scholar, who suggested that the agreement was initialled in 1971 and ratified by Iran on 14 May 1972. The boundary line in the agreement is said to be a median line constructed from the two parties’ mainlands. No effect was apparently given to islands situated between the two coastlines.⁹⁸ However, the most detailed information about the boundary line in the said agreement is that produced by Bundy in his article “Maritime Delimitation in the Gulf”. He wrote that:

the agreement is cast in the same terms as the Iran-Qatar and Iran-Bahrain agreements. Point 1 of the boundary line in the west coincides with the end-points of the Iran/Qatar and Qatar/Abu-Dhabi boundaries, and point 6 in the east is defined as coinciding with the intersection of the lateral boundary between Abu-Dhabi and Dubai. Otherwise, the line is basically a median line, and was referred to as such during the proceedings before The Hague Tribunal.⁹⁹

⁹⁶ See, for example, El-Hakim, *op. cit.*, n.50; also Al-Baharna, *op. cit.*, n.26; Al-Awadi, B., *General Principles of International Law of the Sea and Its Applicability in the Arabian Gulf*, University Press, Kuwait (1988).

⁹⁷ *Arab Report & Record*, 1-15 September (1971), at p.470. In an interview with the Legal Adviser of the UAE Ministry of Foreign Affairs it was confirmed to the present writer that the Abu-Dhabi-Iran agreement, concluded in 1973, was yet to be ratified by the UAE government. No reason was indicated for the UAE’s delay in ratification.

⁹⁸ Amin, *op. cit.*, n.46, at p.134. See also Pirouz Mojtahed-Zadeh, “Iran’s Maritime Boundaries in the Persian Gulf,” *The Boundaries of Modern Iran*, Keith Mclaclan (ed.), University of London, UCL Press, London (1994), at p.101; Gault, *op. cit.*, n.81, at p.216.

⁹⁹ Bundy, R R., “Maritime Delimitation in the Gulf,” *Territorial Foundations of the Gulf States*, Richard Schofield (ed.), University of London, UCL Press, London (1994), at p.182. In order to discover further information on this agreement, the writer made several attempts to contact the Embassy of Iran in London, as well as some UAE Officials. Unfortunately, he was told that they had nothing to release on the said agreement. On 25 July 1995 the author contacted Mr. Bundy to

Any analysis must be speculative since no text has ever been made public. This is, however, not a unique incidence in state practice.¹⁰⁰ Assuming the existence of this agreement, the application of Article 102(2) of the United Nations Charter arises for consideration. This prevents a state which is party to an unregistered treaty from invoking it before any organ of the United Nations.¹⁰¹

The delimitation area between Iran and the UAE in Abu-Dhabi sector extends approximately 62 nautical miles from the Iran-Qatar-UAE tri-point, having the co-ordinates of 53°02'05" E 25°31'50" N to point 1 on the Iran-UAE boundary line agreed upon in 1974. In the delimitation area, there is no island that would disturb the construction of a straight median line connecting the tri-point with point 1 in the Iran-UAE continental shelf boundary line. There is, however, an oil field straddling the median line between them in this sector. The two parties appear to have an understanding over the rights of exploiting the field. According to Bundy "there were periodic meetings between the parties to exchange technical information relating to the field."¹⁰² The part of the field exploited by Iran is known as the Sassan oil field, whereas that part exploited by the UAE is known as the Abu al Bu Khoosh oil field. To prevent the capture problem,¹⁰³ Iran and UAE could follow the pre-existing Iranian-Arab agreements providing that:

Each Party agrees that no oil drilling operations shall be conducted by or under its authority, within a zone extending five hundred (500)¹⁰⁴ meters in which in the submarine area on its side of the Boundary Line ...¹⁰⁵

ask for a copy of the agreement. In his letter of 28 July 1995 Mr. Bundy confirmed that he seen a copy "during the course of a commercial arbitration before the Iran-US claim Tribunal," but did not have a copy of the text.

¹⁰⁰ For example, the UAE-Saudi Arabia agreement of 1974; not until 1994 was the agreement released by one party. For further discussion, see Chapter Four.

¹⁰¹ But it can be invoked before *ad hoc* arbitration tribunal. See the remark of the Tribunal in the *Guinea-Bissau/Senegal Award*, 42 *ILR*, at p. 83, para. 78. For further reading on the question of the failure to comply with the obligation to register an agreement, see Brownlie, I., *Principle of Public International Law*, 4th ed, Clarendon Press, Oxford (1990), at pp.612-3. See also the *Qatar v. Bahrain Case*(1994), at para. 29.

¹⁰² Bundy, *op. cit.*, n. 99, at p.183. See also Amin, *op. cit.*, n. 46, at p. 134.

¹⁰³ For further discussion on this problem, see Al-Baharna, *op. cit.*, n.26, at pp. 298-300.

¹⁰⁴ In some agreements the distance was just 125 metres. See Article 2 of other Iranian agreements with Qatar, Bahrain, UAE and Oman.

¹⁰⁵ Article 4 of the Iran-Saudi Arabia agreement.

Iran and UAE, in addition, could enter into technical arrangements to facilitate the determination of the geographical location offshore in the Sassan and Abu al Bu Khoosh areas.

To sum up, the Abu-Dhabi and Gulf of Oman sectors, as two potential delimitation areas in UAE-Iran offshore boundary, represent an ideal and simple area where a delimitation could easily be reached, and where there is no advantage in seeking a solution through a third-party settlement procedure. However, the desire to reach a package-deal settlement for the entire area of the Iran-UAE network of maritime boundary delimitations, especially in the disputed Islands' sectors, may question the wisdom of concluding a separate agreement in respect of each sector. This may be one of the reasons holding the UAE government back from ratifying its 1974 agreement with Iran in respect of determining part of the continental shelf boundary between them. Because the flexibility and the degree of compromise is much greater where the package-deal technique is to be used—and thus the delimitation area to extend over 214 nautical miles—as against the case where a small sector is to be considered separately.

**The effect of certain Islands
upon the Iranian-UAE's
boundary**

The effect of certain Islands upon the Iranian-UAE's boundary

6

We have seen in the previous chapter that there are three gaps in the United Arab Emirates-Iran maritime boundary; the areas in the Gulf of Oman sector, the Abu-Dhabi sector and the Islands sector. The first two have been dealt with in Chapter Five. As illustrated in the previous chapter, no serious difficulties exist that would prevent the two countries from addressing these un-delimited boundaries. This is in contrast with the situation in the Islands sector. It has been submitted in the previous chapter that the long-standing dispute between the UAE and Iran over the sovereignty of certain Islands in the Gulf, namely, Abu Musa, and the Greater and Little Tunbs islands, has been the primary obstacle to the finalizing of the boundaries between them in this sector. The continuing dispute, moreover, has affected¹ the good relations between the parties involved² and, in the last few years, has given rise to a war of words between Iran on one hand, and a number of Arab countries supporting the UAE position on the other.³

This chapter is devoted to examining what possible effect these Islands may have on the UAE-Iran offshore boundary, and whether that effect would, standing alone, justify the continuing dispute over their ownership. Our treatment of the issue is somewhat different, as we shall see, from the approach adopted in the

¹ The Gulf Corporation Council Secretary General in a statement on the three Islands. See *Al-Kalij*, UAE daily newspaper, 20 October (1992), at p.14; *Al-Ittihad*, UAE daily newspaper, 3 September (1992), at p.1. See also *Al-wast*, weekly magazine published in London in 27 June 1994 interviewing the UAE's Ministry of State for Foreign Affairs.

² Due to the domestic and regional considerations that existed in the 1970s and the 1980s, the UAE government did not consider it wise to sever relations with Iran. Relationships between the two countries were conducted at all levels. Al-Alkim, in *The Foreign Policy of the UAE*, recorded the ups and downs in relations between the two sides during the last two decades; see Al-Alkim, H., *The Foreign Policy of the UAE*, Saqi Books, London (1989), at pp.145-68.

³ *Al-Kalij*, 13 September (1992), at p.1; *Al-Ittihad*, 15 September (1992), at p.1; *Al-Ittihad*, 1 October (1992), at p.1.

case law in dealing with a boundary dispute.⁴ The justification for this is that in the UAE-Iran case no boundary dispute as such exists between the two parties. Their dispute is territorial.⁵ This could explain the absence of any boundary line proposed by one party, and rejected by the other.⁶ What is at stake between them is the claim of one party to have sovereignty over certain Islands in the Gulf set against a counter claim from the other party. This disagreement over the ownership of Abu Musa and the two Tunbs has hitherto never extended to the question of the maritime boundary delimitation between the two mainland coasts. It is not the aim of this work to examine in details the sovereignty over the Islands in question.

This being so, there is some concern among scholars that the effect of these Islands on the two sides' boundaries is one of the principal motives behind the dispute over their ownership.⁷ An attempt to examine the reality of this concern will be conducted in the present chapter. State practice and international decisions will be examined to identify the likely effects that the three Islands may have on Iran's and the UAE's boundaries where the case between them is to be referred to international adjudication. If the conclusion is that the Islands have a considerable

⁴ See, for example, Geoffrey Marston, who explains the approach taken in the France/Canada Award of 1992, Marston, G., "St Pierre-Miquelon Arbitration," 17 *Marine Policy* (1993); at pp. 160-3 Charney, J.I., "Progress in International Maritime Boundary Delimitation Law," 88 *AJIL* (1994), at p.234.

⁵ For a distinction between boundary dispute and a territorial dispute, see Chapter Two.

⁶ Dispute has been defined as "a specific disagreement concerning a matter of fact, law or policy in which a claim or assertion of one party is met with refusal, counter-claim or denial by another." See Merrills, J.G., *International Dispute Settlement*, 2nd ed, Grotius Publications Ltd, Cambridge (1993), at p.1. See also the definition of the PCIJ in *Mavrommatis Palestine Concessions Case (1924)*, of the term 'Dispute'. See PCIJ *Reports Series A-N°2*, at p.11; Jennings, R., "Reflections on the Term 'Dispute'," *Essays in Honour of Wang Tieya*, Macdonald J. (ed.), Martinus Nijhoff Publishers, Dordrecht, Netherlands (1994), at p.402; Higgins, R., *Problems and Process, International Law and How We Use It*, Clarendon Press, Oxford (1994), at pp.195-7; Shaw, M., *International Law*, 3rd ed, Grotius Publications Limited, Cambridge (1991), at pp.629-32; Gordon, E., "Legal Disputes Under Article 36(2) of the Statute," *The International Court of Justice at a Crossroads*, Damrosch L.F. (ed.), Transnational Publishers Inc., New York (1987), at pp.198-202.

⁷ Al-Bdwly Abd, Judge at the Federal High Court of the UAE, *Islands in the Arabian Gulf and the Legality of the Acquisition of Territory by Force*, A dissertation for a Master's degree in public law, submitted at Mohammed Al-Kammes University, Morocco, and reprinted by Ras al-Khaimah Archive and Study Centre, Research Book Series, No. 9 (1992), at pp.348-53. See also the British Foreign and Commonwealth Office, Arabian Department's Memorandum on the Iranian claims to Abu Musa and the two Tunbs islands, 28 June 1970 (unpublished document) at p.1.

effect, it would be of interest to investigate the possibility of any form of settlement whereby the effect of these Islands could be minimized and the general interest of the two parties maintained.

Hence, the present chapter rather than seeking to propose a solution for the sovereignty dispute identifies one of the important reasons behind it. This is, of course, different from the task which international adjudication may be charged with when dealing with a boundary dispute. Such a difference justifies the separate approach that will be used below. This chapter has been divided into three sections: (1) definition of the dispute between the two states; (2) islands in maritime boundary delimitation; (3) the effect of the three disputed islands upon a possible boundary line between Iran and the UAE. In Chapter Seven we shall examine certain methods of peaceful settlement that may help to furnish a solution for the sovereignty dispute. In the conclusion of the next chapter an attempt will be made to suggest a possible solution for the knock-on effect of Abu Musa, Greater and Little Tunbs islands upon the UAE-Iran boundary line.

Section One

Definition of the dispute

The area of maritime boundary with which this chapter is concerned (hereafter termed the “disputed area”) forms part of the maritime boundary of Iran and the United Arab Emirates in the Arabian Gulf. The disputed area, which is illustrated on the map below, may be described by reference to four points (ABCD).

Point **A** is situated on the south coast of Hengaum island on the Iranian coastline, whose geographical co-ordinates are: latitude 26° 36′ 40" N. and longitude 55° 51′ 50"E. Point **B** is situated in the Sha’am area, on the UAE’s coastline, whose geographical co-ordinates are: latitude 26° 03′ 00" N. and longitude 56° 06′ 00"E. Point **C** is situated on the north-east of the Ras Ghantût area, on the UAE’s coastline, whose geographical co-ordinates are: latitude 24°

49' 00" N. and longitude 54° 48' 00"E. Point **D** is situated at Ras-o-Shenas,⁸ on the Iranian coastline, whose geographical co-ordinates are: latitude 26° 29' 35" N. and longitude 54° 47' 20"E.

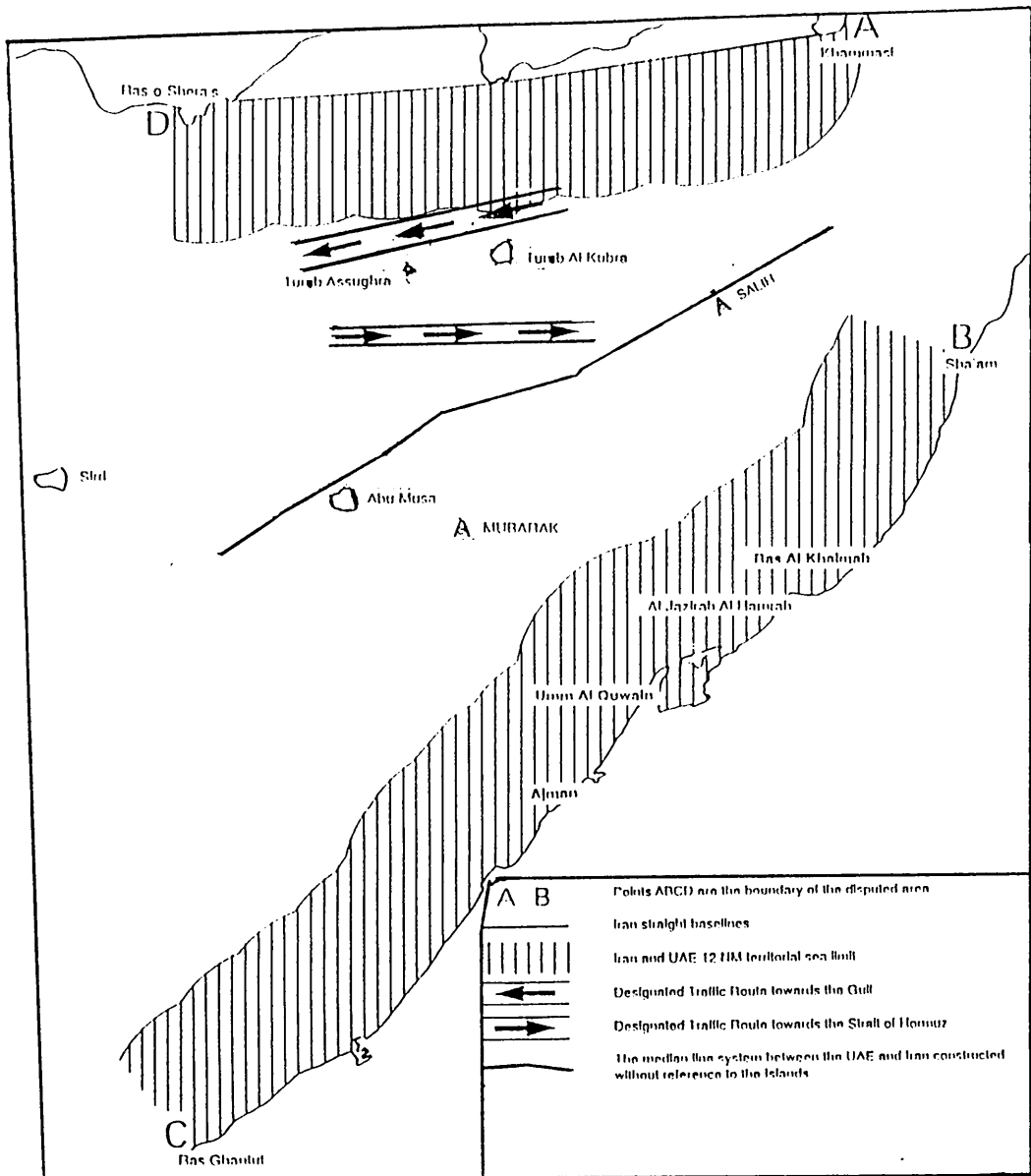


Figure: (21) The disputed area between Iran and the UAE in the Islands sector.
Source: The Author.

⁸ The area is spelt Ra's osh Sheyas in the Admiralty Chart No. 2887. The form which we will use, however, is the one used in the Iranian Decree-Law of 21 July 1973. An English translation of this Decree-Law may be found in the UN, *The Law of the Sea, Baselines: National Legislation With Illustrative Maps* (1989), at pp.194-6.

The continental shelf of this area, indeed of the Arabian Gulf area in general, is characterized by the essential continuity of its geological structure, and by the shallowness of its water which gradually becomes deeper near the Persian side of the Gulf.⁹ The coastlines of the two parties are clearly classifiable as opposite coasts. The UAE's coastline in the disputed area, measured from north-east of the Sha'am to the Ras Ghantût area, is 100 nautical miles. The length of the Iranian coastline in the disputed area, measured from Ras-o-Shenas¹⁰ to the south coast of Hengaum island, is 58.3 nautical miles. The ratio between the two coastlines is 1.71 to 1.

Geographic description of the disputed territory

Abu Musa island lies about 32.40 nautical miles off the UAE coast in Umm al-Quwain, and about 38 nautical miles off the Iranian coast in Ras-o-Shenas.^{11 12} The Island is situated on the UAE side of the median line, about 1 nautical mile inside it. As can be seen from the admiralty chart reproduced below, Abu Musa is approximately 4 square miles in size. Its permanent population of about 800 is of UAE nationality, nearly all of them engaged in fishing.¹³ The Island is connected to the UAE mainland by a regular ferry service.

Little Tunb (or Tunb Assughra) is a small, barren, uninhabited and waterless island, approximately 1 mile long and 3/4 mile wide.¹⁴ It lies about 8 nautical miles to the west of Greater Tunb, about 44 nautical miles from the UAE

⁹ "The area of 20 metres or less in depth closely follows the coast of the UAE to Abu-Dhabi city." See Mitchell, K., "The Persian Gulf," *Persian Gulf States: A General Survey*, Alvin J. Cottrell (ed.), The John Hopkins University Press, London (1980), at p.541; Amin, S. H., *International and legal Problems of the Gulf*, Middle East and North African Studies Press Limited, London (1981), at p. 9; El-Hakim, A., *The Middle Eastern States and the Law of the Sea*, Manchester University Press, Manchester (1979), at p. 66.

¹⁰ See note 8.

¹¹ See note 8.

¹² The Court of Arbitration in the *Dubai/Sharjah Award* found the distance from the Iranian coastline to Abu Musa island to be 43 nautical miles. However, an alternative possible calculation based on Admiralty Chart No. 2887 scale 1,350 000 suggests that the distance from the nearest point on the Iranian coast to the Abu Musa coastline is only about 38 nautical miles. See *Dubai/Sharjah Award*, at p.663 and p.668.

¹³ In addition, the island has about 700 Arab workers. See Al-Bdwly, *op. cit.*, n.7, at p.164. See also Sharjah's argument at *Dubai/Sharjah Award*, at p.668.

¹⁴ "After rain the island is covered with brilliant green vegetation." *Persian Gulf Pilot*, published by Hydrographer of the Navy, 12th ed (1982), at p.94.

coastline at Umm al-Quwain, and 20 nautical miles off the Iranian coastline at Ra's Daskakāh on Qeshm island.¹⁵

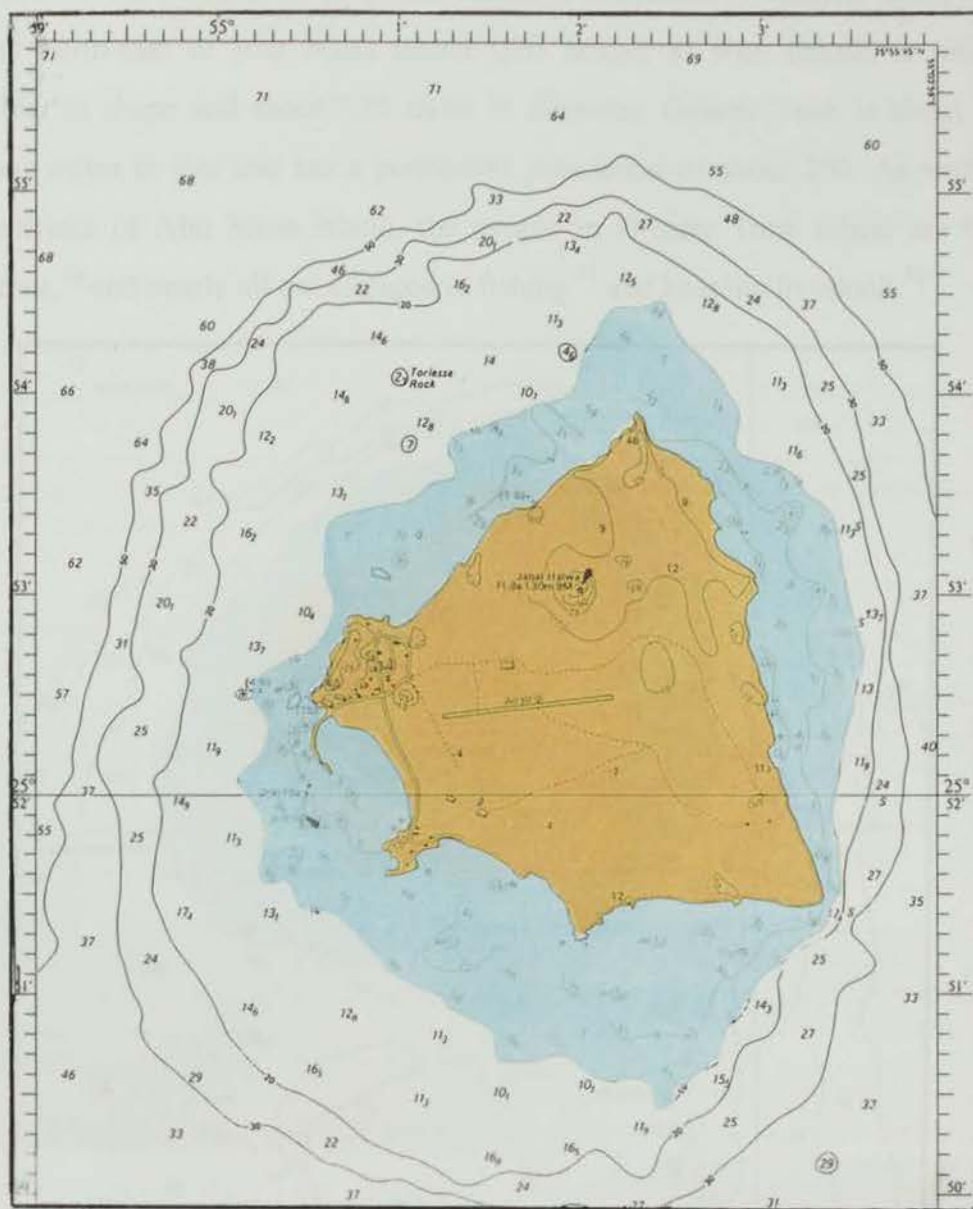


Figure: (22) Abu Musa Island
Source: Admiralty chart No: 3452.

¹⁵ Ibid. See also Young, Y., "The Persian Gulf," *New Direction in the Law of the Sea*, vol. 3, published by The British Institute of International and Comparative Law, vol.1, Oceana Publications Inc., Dobbs Ferry, New York (1973), at p.231; Al-Bdwly, *op. cit.*, n.7, at p.165.

Greater Tunb (or Tunb Alkubra) island lies about 40 nautical miles from the UAE coastline at al-Jazirah al-Hamrah and 15 nautical miles from the Iranian coastline at Ra's Daskakāh on Qeshm island. It is situated 15 nautical miles to the north north-east of Abu Musa island. The Island, as seen below, is roughly circular in shape and about 2.25 miles in diameter. Greater Tunb is about 3.98 square miles in size and has a permanent population of about 200. As with the inhabitants of Abu Musa island, the people in Greater Tunb island are UAE citizens,¹⁶ and nearly all are engaged in fishing¹⁷ and keeping livestock.¹⁸

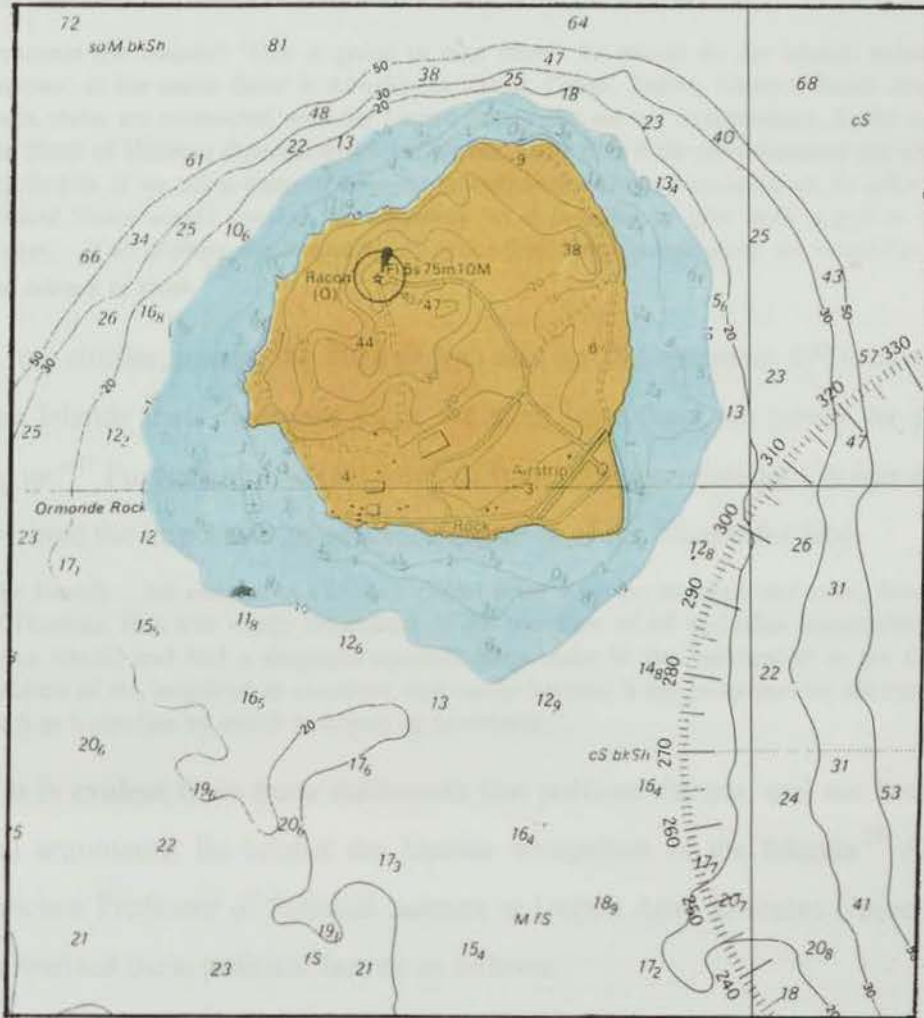


Figure: (23) Greater Tunb Island
Source: Admiralty chart No: 3452.

¹⁶ Al-Bdwly, *op. cit.*, n.7, at p.165.

¹⁷ See the *Report on the two Tunbs Islands*, (Unpublished study prepared for Ras al Khaimah) government, Vinson and Elkins Attorneys at Law, Houston, Texas (1982), Book II, at p. 3.3.

¹⁸ "The Island is covered with coarse grass and shrubs and small venomous snakes are found there, goats and some cattle are kept..." *Persian Gulf Pilot*, *op. cit.*, n.14, at p.93.

The strategic and economic importance of the disputed Islands

The strategic geographical position of the Islands

The three Islands lie just outside the Strait of Hormuz. With such a location they are able to influence the entrance to the Gulf. This important geographical location of the Islands was, and still is— as will be suggested—the real reason behind the Iranian claim for ownership of the Islands. This is demonstrated by various statements made by the Iranian authorities. For instance Abu al Hassan Bani Sadr, the first president of Iran said, in March 1980:¹⁹

Evacuate the Islands? Who is going to take them? To whom do the islands belong? *Not to anyone...* in the south there is Abu-Dhabi, Qatar, Oman, Dubai, Kuwait, Saudi Arabia...to us these states are connected with the United States and are not independent. At the end there is the Strait of Hormuz through which oil passes. They (the Arab governments) are afraid of our revolution. *If we allow them to have the islands they will control the Strait. In other words the United States would control the waterway. Is it possible to give such a gift to the United States?...If all of them, the littoral states of the Gulf, were independent, we would have returned the islands to them.*²⁰

In a similar manner the Shah of Iran said on 28 September 1971, in relation to these Islands that: “we need them, we shall have them, no power on earth will stop us.”²¹ Furthermore, in one study of Iran’s foreign relations Chubin and Zabin explained the important geographical position of the Islands for Iran:

The islands ... are situated at a critical ‘choke point’ near the strategic and easily blocked straits of Hormuz. Iran was vitally dependent on the free flow of oil and other commodities through these straits, and had a disproportionately large stake in free navigation in the Gulf, partly because of the length of its coastline, and partly because it has possessed no alternative means such as a pipeline by which to export its petroleum.²²

It is evident from these statements that political factors, and not historical or legal arguments, lie behind the Iranian occupation of the Islands.²³ Al-Alkim, Associate Professor of Political Science at United Arab Emirates University, has summarized these political factors as follows:

¹⁹ One year after the Islamic revolution.

²⁰ Italics added, quoted from Al-Alkim, *op. cit.*, n.2, at p. 160.

²¹ Quoted from Al-Alkim, H., “The United Arab Emirates’ Perspective on the Islands’ Question,” *Round Table Discussion on the Dispute over the Gulf Islands*, The Arab Research Centre, London (1993), at p.28. For similar statements, see El-Hakim, *op. cit.*, n. 9, at pp.130, 254.

²² See Chubin and Zabih, *The Foreign Relation of Iran, A Developing State in a Zone of Great-Power Conflict*, University of California Press, London (1974), at p.223.

²³ El-Hakim, *op. cit.*, n.9, at p.130.

Iran...was determined to seize the Islands for the following reasons:(1) Freedom of navigation in this waterway at all times was essential, for Iran, unlike Saudi Arabia and Iraq, depended upon the Gulf as the only outlet for its oil exports. (2) Iran needed to exploit its offshore oil resources and to protect not only its extensive oil installations at Kharraq Island and elsewhere but its oil cargoes for the entire length of the waterway.²⁴

The economic importance of the Islands

The importance of the Islands, however, is not confined to their geographical location, but rather extends to their economic value. Two non-living natural resources exist in commercial quantities in the Islands; oil and red oxide. Controlling these resources would not be possible without owning the Islands. Apart from some concession agreements concluded by the Government of Ras al Khaimah to explore and exploit these resources on the two Tunbs prior to the Iranian occupation in 1971,²⁵ there is no information on the condition of the resources in the Tunbs islands. This is due to the Iranian seizure of them, and the suspension of exploitation activities.

In Abu Musa the situation is different. Operations in the Mupark oil field,²⁶ an offshore field situated 9 nautical miles from the island coastline towards the Sharjah mainland, have not been affected by the presence of Iranian troops on the northern part of the Island. The field produces about 40 thousand b/d ²⁷“with plans to sell 100 million cubic feet/day of gas. It has estimated remaining reserves of 50 million barrels of oil and 1.5 trillion cubic feet of gas.”²⁸ The issue of exploiting the Mupark field remains governed by the arrangement between Sharjah and Iran in the Memorandum of Understanding. Article 4 of the Iran-Sharjah Memorandum provides:

²⁴ See Al-Alkim, *op. cit.*, n.21, at p.29.

²⁵ For example, the Ruler concluded an oil concession agreement with the Union Oil Exploration and Production Company and the Southern Natural Gas Company on 3 March 1964, to explore oil and gas on Emirates' land, including the area of the two Tunbs and their territorial seas. See the *Report on the two Tunbs Islands*, *op. cit.*, n.17, at p.108.

²⁶ In addition to the oil field the island of Abu Musa was reported to contain a commercial quantity of red oxide. See Laithwaite, “Memorandum on the status of islands of Tunb, Little Tunb, Abu Musa and Sirri islands on 24 August 1928,” *Arabian Boundary Disputes Primary Documents 1853-1960*, vol. 13, Archive Editions, Schofield and Blake (eds.) Redwood Press Ltd., England (1988), at p. 79, para.1; *Persian Gulf Pilot*, *op. cit.*, n.14, at p.95.

²⁷ Al-Ulama, H.M., *The Federal Boundaries of the United Arab Emirates*, Thesis submitted for the degree of Ph.D., Department of Geography, University of Durham (1994), at p. 200.

²⁸ See David Pike, “Cross-border Hydrocarbon Resources,” *Territorial foundation of the Gulf States*, Schofield R. (ed.), University of London, UCL Press, London (1994), at p. 197.

Exploitation of the petroleum resources of Abu Musa and of the seabed and subsoil beneath its territorial sea will be conducted by Buttes Gas and Oil Company under the existing agreement which must be acceptable to Iran. Half of the governmental oil revenues hereafter attributable to the said exploitation shall be paid directly by the company to Iran and half to Sharjah.²⁹



Figure: (24) The three disputed Islands.
Source: *National Atlas of the UAE*, The University of the UAE Press, UAE, (1993)..

²⁹ For comments on this Article, see *Joint Development of Offshore Oil and Gas, Model Agreement for States for Joint Development with Explanatory Commentary*, vol.I, the British Institute of International and Comparative Law, London (1989), at p.56.

The legal status of the disputed Islands

The sovereignty of the three Islands was, and still is, the subject of a long-standing dispute between Iran and the UAE (representing the Emirate of Sharjah, in respect of Abu Musa, and the Emirate of Ras al Khaimah in respect of the two Tunbs). The two rival parties are in general agreement that the Islands have been owned from time immemorial.³⁰ They disagree however as to who is the sovereign or who held the original title. Each of them claims that they were and still are the owner.

The UAE claim is based on the historical title that the two concerned Emirates, Ras al Khaimah and Sharjah, for more than two centuries exercised over the three Islands; a continuous and peaceful display of state function with sovereign-acting intention.³¹ Evidence of such activities include the hoisting of the two Emirates' flags on the Islands, in the presence of the representatives of the two Emirates' Rulers on the Islands' soil. Other evidences of the Emirates' authority over the Islands are:

- (a) The collection of annual fees from the residents of the Abu Musa and Greater Tunb islands.
- (b) The establishment of public and military constructions on the Abu Musa and Greater Tunb islands.³²
- (c) The governments of both Ras al Khaimah and Sharjah concluded concession agreements to explore and exploit the natural resources on the Islands and in their territorial seas.³³

³⁰ See below.

³¹ For a discussion on the effective control, see Brownlie, I., *Principles of Public International Law*, 4th ed, Clarendon Press, Oxford (1990), at pp. 138-45; Shaw, *op. cit.*, n.6, at pp. 289-302.

³² Al-Alkim, *op. cit.*, n.21, at p.30.

³³ For example, on 6 February 1952 an agreement was reached between the Ruler of Ras al Khaimah and Golden Valley Colors Limited of Wick, Bristol, England to mine and export any red oxide in the Tunbs islands. Article 2 of the agreement provides: "...the Shaikh hereby grants to the Company...the sole and exclusive right to search for work excavate mine or otherwise recover and export any Red Oxide or Iron which may be situate in the Islands of Tunb and Nabiya Tunb in the Persian Gulf *the Property of the Shaikh...*" *Italic added*. Quoted from the *Report on the two Tunbs Islands*, *op. cit.*, n.17, Document No. 17, at p.98.

(d) The inhabitants of the Islands hold passports issued by the government of the Emirates concerned.

In addition, the UAE claim is understood to be based on the following grounds:

- (1) The recognition and support of the British Government during its presence in the Gulf region.³⁴
- (2) The inhabitants of the Islands were Arabs who shared language, character, tradition and tribal links with the Arab people in the Emirates.³⁵
- (3) Iran offered to buy or to lease the Islands from Sharjah and Ras al Khaimah in 1929, 1930 and 1971. This is, in turn, regarded as recognition by Iran of the two Emirates' ownership of the Islands.³⁶

In similar manner Iran, which officially claimed the two Tunbs and Abu Musa for the first time in 1877 and 1888 respectively, based its claim of sovereignty on historical factors. Iran argued that the Islands were controlled by the al-Quwasim Arab Sheikhs of Lingah, who "had for long been Persian subjects governing Lingah as Persian officials, and...it was in this capacity that they had administered the Islands, which had become Persian territory."³⁷ Moreover, the three Islands, Iran claims, had always been Iranian, but British 'Imperialism' had given them to the Arab al-Quwasim in the southern side of the Gulf. Iran therefore demanded that these three Islands be considered to fall under Iranian sovereignty.³⁸

Iran, in addition, has advanced its claim to the two Tunbs islands on the basis of geographical considerations. It has argued that the two Tunbs lie closer to the

³⁴ Laithwaite, *op. cit.*, n.26, at pp.84-6. See also a letter from the Ruler of Ras al-Khaimah to the Minister of Foreign Affairs for the UAE on 25 April 1972; reproduced in the *Report on the two Tunbs Islands*, *op. cit.*, n.17, at pp.51-61.

³⁵ Al-Alkim, *op. cit.*, n.21, at p.30.

³⁶ Ruler of Ras al-Khaimah Latter, *op. cit.* n.34. See also Lascelles, "Memorandum on the Persian Claim," *Arabian Boundary Disputes Primary Documents 1853-1960*, vol. 13, Archive Editions, Schofield and Blake (eds.) Redwood Press Ltd., England (1988), at p.136, para.11.

³⁷ Laithwaite, *op. cit.*, n.26, at p.79, para.3. For the British view of the Persian claim, see Mr. Lascelles's Memorandum, *ibid.*, at p.134, para.8.

³⁸ The statement of the representative of Iran to the UN. See *UN Security Council Official Records*, 26th Year, 1610th meeting: 9 December 1971, New York (1971), at p.18, para.211. Also the Iranian newspaper *Kayhan International* on 23 October 1971, quoted from *UN Security Council Official Records*, 1610th Meeting: 9 December 1971, New York (1971), at p.5, para. 69. See also Chabin and Zabih, *op. cit.*, n.22, at p.223.

Iranian mainland than to the UAE mainland.³⁹ Mirfenderski, an Iranian professor in international law, suggested from this that:

The position of the Tonbs⁴⁰ near the Iranian coast and the bicoastal dominion of the Buyids in the eastern Persian Gulf leads to the inescapable and necessary conclusion that in Buyid times (A.D. 945-1055) the Tonbs in all likelihood belonged to Iran. Just as Oman was annexed to Fars, the Tonbs too in all likelihood belonged to Fars as a matter of the administrative structure of Iran's maritime possessions.⁴¹

Furthermore, Iran in supporting its claim furnished a British War-Office Map as evidence of its title. Its argument was that the Islands were coloured in the same fashion as the Iranian mainland on the British War-Office Map of 1886.⁴² This, the Iranians alleged, confirmed British recognition of Persian ownership of the Islands.⁴³ Some years later, the British government informed the Iranian government that the map had been a mistake and the "error in question. ... cannot be taken as a formal declaration by His Majesty's government of their view of the status of the islands."⁴⁴ Such a declaration from the British Government did not convince the Iranian Cabinet. Mr. Afshar, the Iranian representative to the UN, in answering the British declaration stated that:

³⁹ As regards a title arising out of contiguity, Haber, the arbitrator in the *Island of Palmas Case*, stated that "it is impossible to show the existence of a rule of positive international law to the effect that islands situated outside territorial waters should belong to a State from the mere fact that its territory forms the *terra firma* (nearest continent or island of considerable size)." Scott, *The Hague Court Report*, Second Series, Oxford University Press, New York (1932), at p.111.

⁴⁰ The Iranian spelling for Tunbs.

⁴¹ Mirfenderski, G., "The Ownership of the Tonb Islands: A legal Analysis," *Small Islands, Big Politics*, Amirahmadi H. (ed.), Macmillan, USA (1996), at p.121.

⁴² The writer had an opportunity to see the said map. Surprisingly, and contrary to the Iranian claim, it contains no colour for the Iranian mainland that is distinguishable from the mainland of neighbouring states. What the map does show is an orange line marking the Iranian coastline in the Arabian Gulf and the Gulf of Oman. Some of the islands in the Gulf, including the three disputed Islands, are coloured orange, i.e., the colour that marked the Iranian coastline, not the Iranian mainland. Examining this map in more detail to ascertain the value of the Iranian claim is beyond the scope of this work. But, at first glance, the said map neither accept nor rejects the Iranian claim.

⁴³ Lascelles, *op. cit.*, n.36, at p.131, para.2. Arbitrator Haber, in his Award in the *Island of Palmas Case*, cited conditions that required a map to be accepted as evidence in law. In his conclusion he stated that: "Anyhow, a map affords only an indication—and that a very indirect one—and, except when annexed to a legal instrument, has not the value of such an instrument, in involving recognition or abandonment of the rights." See *Island of Palmas Case*, *op. cit.*, n.39, at pp.109-10. See also Taha, F., *The International Legal Aspects of the Boundaries of the Sudan with Ethiopia and Kenya*, PhD. Dissertation, vol. 1, Jesus College, Cambridge University (1973), at pp.172-87; Akweenda, S., "The Legal Significance of Maps in Boundary Questions: A reappraisal with Particular Emphasis on Namibia," 60 *BYBIL* (1989), at pp.205-55.

⁴⁴ Laithwaite, *op. cit.*, n.26, at p.85, para.36.

For more than a century, beginning in 1770, British maps marked the Tonb islands as being Persian. A mistake can be made once, but what sort of mistake is it that can be made for 120 years?⁴⁵

Finally, Iran argued that the Islands have a strategic geographical position in that they control the entrance to the Gulf. One of Iran's vital interests is to secure free navigation in the Gulf. This, Iran alleges, could not be achieved without controlling the Islands.⁴⁶ The Shah of Iran in this context said that: "to the possibility of certain strategic positions [meaning these three Islands] falling into the wrong hands: a small group of men using a boat and a bazooka could threaten navigation in the waterway."^{47 48}

In international law the value of these non-historical considerations such as geographical factors and evidence from maps, is that these factors, in the general understanding in the literature, "can never be conclusive. But they may furnish important evidence of general opinion or repute as to the existence of certain state of fact, and *pro tanto*, therefore, may support the conclusion that that state of fact does actually exist."⁴⁹ This is in contrast with the case of the historical factor, which may constitute the crucial issue that would determine who has the better rights to the Islands. To decide between these two competing claims it would be necessary, as arbitrator Haber in the *Island of Palmas Case*⁵⁰ and the World Court in *Minquiers and Ecrehos Case*⁵¹ have done, to study and analyse "first the one title by itself, and the other by itself, then the first again, comparing the

⁴⁵ See the representative of Iran's statement, *op. cit.*, n.38, at p.18, para.212. See also Mirfenderski, *op. cit.*, n.41, at p.131.

⁴⁶ Pirouz Mojtahed-Zadeh, "Iran's Maritime Boundaries in the Persian Gulf, The case of Abu Musa island," *The Boundaries of Modern Iran*, Keith Mclachlan (ed.), UCL Press, London (1994), at p.106, and see also Chabin and Zabilh, *op. cit.*, n.22, at p.223.

⁴⁷ *Kayhan International* on 23 October 1971. Quoted from the statement of the representative of Iraq to the UN Security Council. See *UN Security Council Official Records*, *op. cit.*, n.38, at p.6, para.71, and see the *Report on the two Tunbs Islands*, *op. cit.*, n.17, at p.3.110; Taha, *op. cit.*, n.43, at p.173.

⁴⁸ This argument is of a political nature which has no direct role either to conform to or to reject a state title to a territory.

⁴⁹ Fitzmaurice, G., *The Law and Procedure of the International Court of Justice*, 1947-59, Cambridge University Press, Cambridge (1995), at p.315. See also *Island of Palmas Case*, *op. cit.*, n.39, at pp.109-111.

⁵⁰ *Island of Palmas Case (United States of America v. the Netherlands) (1928)*, *op. cit.*, n. 39, at p.93.

⁵¹ *Minquiers and Ecrehos Case (France v. UK)*, ICJ Reports 1953.

two titles...in respect of their legal weight, taken as a whole over the whole period.”⁵² Such a task lies beyond the scope of this work. Notwithstanding, the events of November 1971—when Iranian troops landed on the Islands—deserve some clarification.

The events of November 1971

In 1968, shortly after the British Government announced its intention of withdrawing from the region by the end of 1971, Iran embarked on a campaign to justify its claims of ownership of the Islands. The British Government, by virtue of its special treaty relationship with the Emirates,⁵³ was anxious to solve the Islands’ problem before pulling out from the Gulf. At the same time, Iran, the most powerful state in the region, had threatened not to recognize the proposed federation between the Emirates, due to be established in December 1971, and to annex the three Islands by force, if its demands were not met. This threat was narrated in the Iranian media. For example, Iran’s *Kayhan International* reported, on 9 November 1970, that “Iran would be prepared to use force to maintain its sovereignty over the islands if its claims were not conceded.”⁵⁴

The British Government appointed Sir William Luce as a special envoy to mediate between the two sides.⁵⁵ He suggested an arrangement wherein the Islands would remain disputed territories. Iran rejected the offer.⁵⁶ A suggestion to refer the issue to a binding arbitration was advanced by the Emirates, but was also discarded by Iran.⁵⁷ In September 1971 the British envoy discussed the Islands’ issue with the Iranian ambassador to London. The two sides at the end of their negotiations asked the two Emirates to formulate a declaration whereby they

⁵² Sir L. Heald oral argument before the World Court in the *Minquiers and Ecrehos Case*, see *ICJ Pleadings* (1953), vol. 2, at p.49. See also the ICJ Judgement in this case, *ICJ Reports 1953*, at pp.53-9. And see Fitzmaurice, *op. cit.*, n.49, at p.276.

⁵³ See the introduction for brief a discussion on the relationship between the Emirates and the British Government.

⁵⁴ Quoted from Al-Alkim, *op. cit.*, n.21, at p.28. See also Al-Alkim, *op. cit.*, n.2, at pp. 140-2. And see the *Times of London*, 18 November (1971), at p.7.

⁵⁵ Al-Tadmory, A.J., *The Three Arabian Islands*, Ras al Khaimah National Press, UAE (1995), at p. 129. For further details on mediation, see Chapter Seven.

⁵⁶ *Ibid.*, at p.128.

⁵⁷ *Ibid.*, at p.151.

would relinquish their sovereignty over the Islands. In return, Iran would provide the Emirates with financial assistance, and would accept the median line system as the boundary line between the two sides' respective mainlands. The two Emirates declined to accept this British-Iranian proposal.⁵⁸

In October 1971 the Iranian Government introduced a new idea for settling the dispute. Their proposal was that the Arabs should relinquish their sovereignty of the two Tunbs islands, and in return Iran would acknowledge that its ownership to the island of Abu Musa was not undisputed. The proposal, in addition, would give Iran full jurisdiction in certain areas of Abu Musa, and would recognise the rights of Sharjah "to name the company to explore the Island's waters for oil on condition that the company would come under Iranian Laws. Oil income, when discovered, would be divided equally between Iran and Sharjah."⁵⁹ In respect to the two Tunbs islands, Iran proposed a financial agreement with the Ruler of Ras al Khaimah whereby the Emirate would receive an annual payment of £1.5 million for nine years, and 50 percent of any oil discovery in the two Tunbs areas.⁶⁰

Iran and the United Kingdom were satisfied with these arrangements, whereas the two Emirates were not.⁶¹ In the last two days of November 1971 the Emirate of Sharjah accepted the British proposal to give Iran the rights to deploy its troops on the northern part of the island of Abu Musa and to maintain the disputed status of the Island. Not unexpectedly, Ras al Khaimah continued to oppose the British proposal. The result was that Sharjah concluded with Iran the so-called 'Memorandum of Understanding'⁶² over Abu Musa island, while Ras al Khaimah did not. Iran subsequently occupied the two Ras al Khaimah islands of Tunbs.

⁵⁸ Ibid., at pp.129-31.

⁵⁹ *Times of London*, 2 November (1971), at p.8.

⁶⁰ Al-Tadmory, *op. cit.*, n.55, at p.149 and p.165.

⁶¹ See the *Report on the two Tunbs Islands*, *op. cit.*, n.17, at p.3.59. See also the Sharjah's daily newspaper *al-Khaleej*, dated 2 and 3 November (1971); *Times of London*, 2 November (1971), at p.8.

⁶² For a distinction between treaties and informal instruments, such as Memorandums of Understanding, see Anthony, A., "The Theory and practices of informal International Instruments," 35 *ICLQ* (1986), at pp.787-812.

In respect to Abu Musa island the preamble and Articles 1 and 2 of the Memorandum of Understanding read:

Neither Iran nor Sharjah will give up its claim to Abu Musa nor recognise the other's claim.

(1) Iranian troops will arrive on Abu Musa. They will occupy areas the extent of which have been agreed on the map attached to this memorandum; (2/A) Within the agreed areas occupied by Iranian troops, Iran will have full jurisdiction and the Iranian flag will fly; (2/B) Sharjah will retain full jurisdiction over the remainder of the island. The Sharjah flag will continue to fly over the Sharjah police post on the same basis as the Iranian flag will fly over the Iranian military quarters.⁶³

The text, in addition, contain some arrangement over the exploration of the petroleum resources of Abu Musa,⁶⁴ and the rights of the nationals of each party to fish in the territorial sea of the Island.⁶⁵

Since the early 1980s, however, Iran had begun to interfere with and to encroach in that part of the island of Abu Musa which it had been agreed was to be under the UAE jurisdiction.⁶⁶ These encroachments came to the surface in August 1992 when the Iranian police prevented one of the UAE passenger-ferrys, with 110 people on board, from disembarking in the UAE part of the Island. Such action was justified by Iran on the basis of the failure of the passengers to obtain an entry visa to Iran. In the face of significant diplomatic support for the UAE in the region, Iran backed off and blamed the incident on the "misjudgement of junior Iranian officials."⁶⁷

Subsequently, the two parties began their first formal negotiation over the issue of the Islands.⁶⁸ Both parties supported the need to find a peaceful

⁶³ For the text of the Memorandum, see Al-Baharna, H., *The Arabian Gulf States*, 2nd ed, Librairie De Liban, Beirut (1975), at p.345; see also the *Times of London*, 30 November (1971), at p.6.

⁶⁴ See above in "the economic importance of the Islands."

⁶⁵ Article 5 of the Memorandum of Understanding declared that: "The nationals of Iran and Sharjah shall have equal rights to fish in the territorial sea of Abu Musa."

⁶⁶ Al-Alkim, H., *The GCC States in an Unstable World*, Saqi Books, London (1994), at p.114. For examples of these encroachments, see below.

⁶⁷ Pirouz Mojtahed-Zadeh, "Perspectives on the Territorial History of the Tonb and Abu Musa Islands," *Small Islands Big Politics*, Amirahmadi, H. (ed.), Macmillan, USA (1996), at p.59. For comments on the incident, see Al-Ulama, *op. cit.*, n. 27, at pp.200-1; Rugh, W., "The Foreign Policy of the United Arab Emirates," *50 The Middle East Journal* (1996), at pp.60-2.

⁶⁸ This delay in starting the negotiation between the two sides was not because the Islands' issue had been neglected, but because some domestic and regional affairs in both countries suggested the undesirability of pressing the Islands' issue in the last two decades. In despite of this, the UAE Government took every opportunity before the UN General Assembly to record its objection to the Iranian occupation on the two Tunbs, and to the Iranian violation to the Memorandum of

settlement to the question, though there was no treaty obligation between them to negotiate a settlement or to resort to any other form of third-party settlement. The UAE, however, felt the attempt to solve the dispute by negotiation was exhausted after the failure of the two parties to make any progress. Secondly, Iran, although it committed itself to meaningful negotiations, did not refrain from its attempts to change the existing social and political situation on the Islands in order to support its claim of sovereignty. This is manifested in the Iranian actions to build civil and military constructions on Abu Musa island and to encourage Iranian citizen from the mainland to settle on the Island.⁶⁹ At the same time Iran, in pursuing its policy of changing the identity of the Island, began to harass the livelihood of citizens of the Emirates living there, in order to force them to leave. This policy took various forms of intervention in “the daily lives of the citizens of the Island by preventing them from constructing new buildings or renovating old ones, closing down their businesses, and requiring Iranian permits for new businesses.”⁷⁰ In respect to the two Tunbs, Iran objected to the UAE demand that it should terminate its military occupation of these Islands.⁷¹ In addition, at every opportunity Iran claimed the Islands as Iranian and its sovereignty over them to be non-negotiable.⁷² Therefore, the UAE has considered recourse to international adjudication necessary to solve the dispute and to maintain the friendly relationship between the two neighbouring states. Iran, on the contrary, believes negotiation can still provide a settlement to “the misunderstanding with the

Understanding of 1971 over Abu Musa, see the *UN Security Council Official Records*, Doc. No S/PV.161, 9 December 1971; DOC. No. S/10740, 18 July 1972; Doc No. S/PV.2055, 5 October 1972; Doc. No. S/PV/1763 20 February 1974; Doc. No. A/C.1/PV.2092, 19 November 1975; Letter from the UAE Ministry of Foreign Affairs to UN Secretary general, 6 August 1980; Doc No. S/1996/692, 26 August 1996. See also Ali Himidane, the former UAE ambassador to the UN, *Al-Kalij*, UAE daily newspaper, 11 November (1993); Arab Research Center, *Round Table Discussion on The Dispute over the Gulf Islands*, London (1993), at p.53; Al-Bdwly, *op. cit.*, n.7, at pp.355. For the reasons that suggested the undesirability of presenting the Islands’ issue in the last two decades, see Al-Alkim, *op. cit.*, n.2, at pp.145-68.

⁶⁹ Al-Alkim, *op. cit.*, n.2, at p.114; Al-Bdwly, *op. cit.*, n.7, at pp.343-6; *Al-Ittihad*, UAE daily newspaper, 20 September (1994); *Al-Kalij*, UAE daily newspaper, 20 December (1995).

⁷⁰ Al-Alkim, *op. cit.*, n.66, at p.114.

⁷¹ *Ibid.*, at p.115.

⁷² *Al-Kalij*, UAE daily newspaper, 20 September (1992).

UAE,”⁷³ even without any signs of achieving progress. Recourse to international adjudication is still rejected by Iran without any formal explanation.⁷⁴

To sum up, the need for Iranian consent to refer the dispute to the World Court is the main issue blocking the UAE attempt to recourse to international adjudication. This need might not appear to be an issue were the 1982 Law of the Sea Convention to enter into force between them. It will be recalled that the Convention contains a comprehensive system for the settlement of disputes by peaceful means. In the light of this system Iran and UAE may unilaterally refer the dispute between them to one of the forums listed in Article 287(1); whether the plaintiff refers to it as a territorial and delimitation dispute or as only a delimitation dispute, the result appears to be the same. This is simply because submitting the dispute as a maritime boundary delimitation will certainly require a judgement regarding the dispute between them over the ownership of the three Islands. The power of a court or tribunal, having jurisdiction under Section 2, to decide cases which are not on the law of the sea is supported by the convention itself. Article 293(1) authorizes the court or tribunal to apply customary law as far as it is not incompatible with the rules of the 1982 Conventions. Moreover, there is no “neat division between a law of the sea case and other types of dispute.”⁷⁵

This being so, Article 298(1) allows states to exclude certain disputes including maritime boundary delimitation from being subject to compulsory settlement procedure.⁷⁶ In this case the only possibility of referring the dispute to international adjudication is to conclude an agreement to that effect.⁷⁷ These

⁷³ Statement from the Iranian Embassy to the UAE, reprinted in Al-Tadmory, *op. cit.*, n.55, at p.314.

⁷⁴ Statement from the UAE Ministry of Foreign Affairs, reprinted in *Ibid.*, at pp.311-3.

⁷⁵ See Boyle, A., “Dispute Settlement and the Law of the Sea Convention: Problems of Fragmentation and Jurisdiction,” 46 *ICLQ* (1997), at p.49. Maritime boundary delimitation disputes and disputes over the sovereignty of islands are clear examples of the connection between a law of the sea case and other international law cases.

⁷⁶ See the observation of Professor Boyle on the effect of this allowance on the overall force of the system of dispute settlement in the Convention. See *Ibid.*, at pp.46-7.

⁷⁷ If no agreement can be reached within a reasonable period of time, any party to the dispute may submit the dispute to compulsory conciliation under Annex V, section 2. For this to be valid under the provisions of Article 288(a) the dispute should be one which only arises after the 1982 Convention entry into force. Hence, past disputes, unless the parties otherwise agree, are excluded from the scope of compulsory resort to conciliation. Secondly, disputes concerning sovereignty over land territory or islands, according to Article 298(1)(a)(i), are also excluded. As far as Iran

limitations on the provision of compulsory jurisdiction of settlement may only reflect an ancient argument that “obligatory judicial settlement must be limited to matters of minor importance.”⁷⁸ Disputes of a grave character, i.e. these affecting the vital interests of a state, such as territorial disputes, “are unfit for compulsory arbitration.”⁷⁹ As a result, the current problem of the need for Iranian consent to refer the dispute to judicial settlement is still facing the UAE Cabinet, even if Iran and UAE were to ratify the LOS. This is because Iran, rejecting any international adjudication at the moment, would presumably exclude maritime boundary disputes from the scope of the compulsory settlement procedure. Hence, there is no real advantage likely to be gained, as far as the settlement of the Iranian-UAE’s dispute is concerned, from ratifying the 1982 Convention.

The effect of the Iranian seizure of the Islands on navigation in the Gulf

The Iranian occupation of the UAE Islands has had various political and social effects. As far as the law of the sea is concerned this occupation may affect navigation in the Arabian Gulf. One of the vital interests of other littoral states in the region is to maintain unimpeded passage in this semi-enclosed sea. In the light of this it is of value to examine what effect, if any, the Iranian occupation of the Islands may have on the freedom of navigation in the Gulf. This is indeed an important issue, since the Intergovernmental Maritime Organization (IMO) designated four areas in the Gulf to be used as shipping routes.⁸⁰ The two Tunbs, as appears below, are situated on the traffic separation zones of one of these four sea-lanes, while Abu Musa island lies only 13 nautical miles to the south of the traffic routeing. Since the Iranian seizure of the two Tunbs in 1971, traffic

and UAE are concerned there is no maritime boundary delimitation dispute which has arisen between them until now. Their dispute, as noted earlier, is limited to their difference over the ownership of Abu Musa and the two Tunbs islands. Such a dispute is excluded from the compulsory resort to conciliation.

⁷⁸ Lauterpacht, H., *The Function of Law in the International Community*, Clarendon Press, Oxford (1933), at p.143.

⁷⁹ Ibid. For more dissection on the so-called political disputes, see Ibid., part III.

⁸⁰ *Persian Gulf Pilot* (1982 copy), *op. cit.*, n.14, at p.10; see also Al-Bdwly, *op. cit.*, n.7, at pp.166-8. And see Admiralty Chart, No.2858 (Gulf of Oman to Shatt Al ‘Arab), printed in 1988.

routeing has been entirely within the Iranian territorial sea.⁸¹ Foreign ships using the sea-lanes in the Tunbs area come, as a result, under Iranian sovereignty. The effect of such development and the rights of passage in the Iranian territorial sea will now be considered.

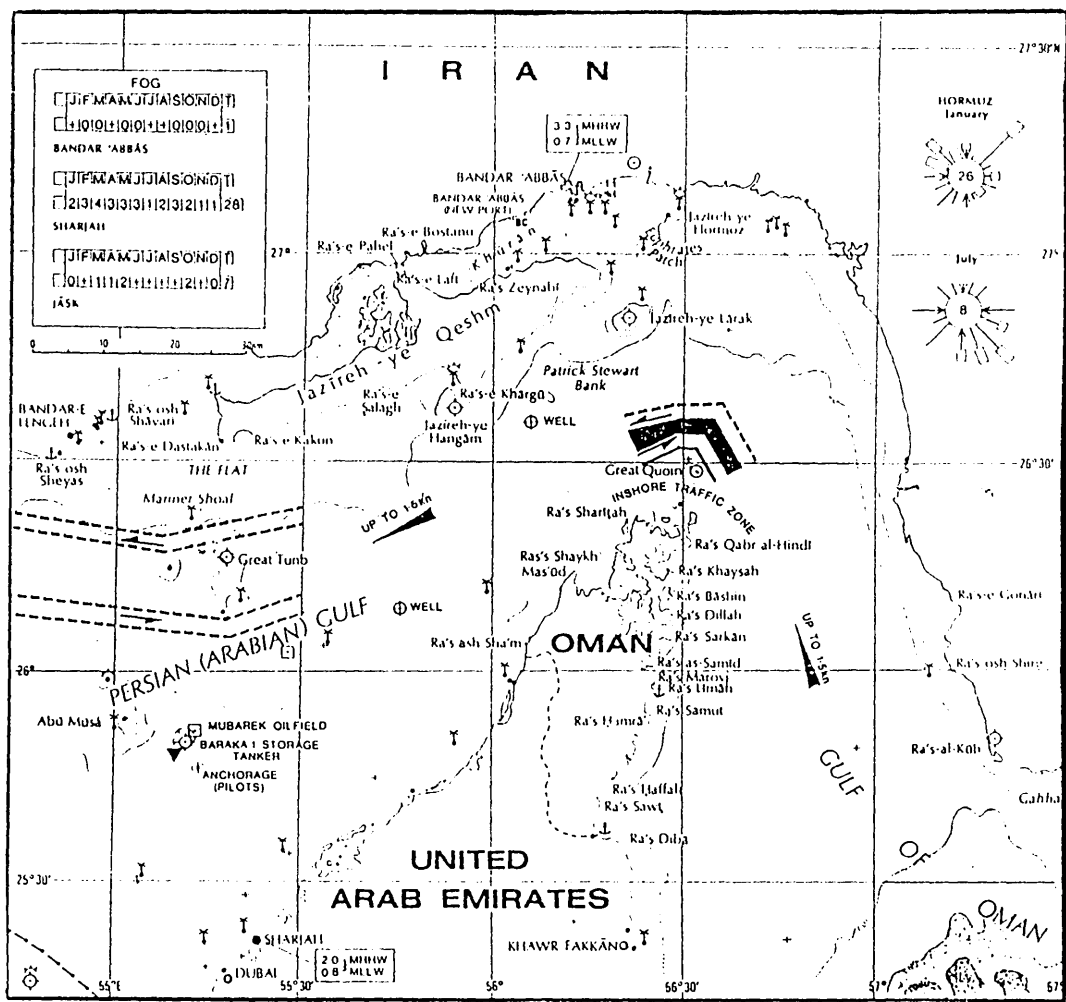


Figure: (25) Sea-lanes in the Tunbs area.
Source: *The Times Atlas of the Sea*, (1989) at p.154.

⁸¹ Al-Bdwly, *op. cit.*, n.7, at pp.166-8. See also the *Times Atlas and Encyclopaedia of the Sea* (1989), at p.154.

The right of innocent passage is considered as one of the most important principles in international law.⁸² It is indisputably applicable to merchant ships within the provision of international law.⁸³ Article 5 of the Iranian Marine Law of 1993 reaffirmed the right of innocent passage for foreign merchant ships through the Iranian territorial sea.⁸⁴ Iran, as a coastal state, has the right in international law to take “the necessary steps in its territorial sea to prevent passage which is not innocent,”⁸⁵ and to *temporarily suspend in specified areas of its territorial sea* the rights of passage, “if such suspension is essential for the protection of its security, including weapons exercises.”⁸⁶ The right of suspension was adopted in the Iranian law of 1993 without, however, any limitation. Article 8 declares that:

The Government of the Islamic Republic of Iran inspired its high national interest and to defend its security may suspend the innocent passage in parts of its territorial sea.

Iran therefore can block the international traffic route in the two Tunbs areas, which becomes part of its territorial sea as a result of its occupation to the Islands. Indeed, during the Iran-Iraq conflict (1982 to 1988) the belligerent parties announced war zones. As far as the Iranian war zone⁸⁷ is concerned it extended for a distance of at least 12 nautical miles beyond the median line. All Iranian

⁸² See Article 17 of the 1982 Convention; Churchill and Lowe, *The Law of the Sea*, Manchester University Press, New rev. ed., Manchester (1988), at pp.68-76; Shaw, *op. cit.*, n. 6, at pp.351-3; Brownlie, *op. cit.*, n.31, at pp. 194-7; Butler, W.E., “Innocent passage and the 1982 Convention, the Influence of Soviet Law and Policy,” 81 *AJIL* (1987), at pp.331-47.

⁸³ There is, however, some controversy over the recognition of an equivalent right for warships. For example, the Court in the *Corfu Channel* case 1949 avoided answering the question of innocent passage of warships through territorial seas not included in a strait. See *ICJ Reports 1949*, at p.30. See also *Oppenheim's International Law*, 9th ed., vol. I, Peace, Jennings and Watts (eds.), Longman, London (1996), at pp.618-20; O'Connell, D., *The International Law of the Sea*, Shearer (ed.), Clarendon Press, Oxford (1982), at pp.274-97; Jessup, P.C., *The Law of Territorial Waters and Maritime Jurisdiction*, G.A. Jennings Co. INC, New York (1927), at p.120; Bowett, D., “Second United Nations Conference on the Law of the Sea,” 9 *ICLQ* (1960), at p. 418; McDougal and Burke, *The Public Order of the Oceans*, Yale University Press, UAS (1962), at pp. 192-4; Gilmore, W., “Sea and Continental Shelf,” 21 *The Law of Scotland* (1994), at p.9, para.9.

⁸⁴ Warships, submarines and nuclear-powered ships are excluded from the right of innocent passage in the Iranian territorial sea without prior authorization. Hence such ships do not enjoy the right of innocent passage in the international traffic route in the two Tunbs area. Article 9 of the Iranian Marine Law of 1993.

⁸⁵ Article 25(1) of the 1982 Convention. To the same effect, see Article 7 of the Iranian Law.

⁸⁶ Article 25(3) of the 1982 Convention. Moreover, because the international shipping route is within the Iranian territorial sea, Iran is entitled in law to exercise “enforcement jurisdiction against vessels infringing prescribed schemes.” See Churchill and Lowe, *op. cit.*, n.82, at p.213.

⁸⁷ Known also as an advisory zone in the Admiralty Chart No.2858.

coastal waters were declared a war zone, whereby foreign ships—with the exception of deep-draught tankers—were prohibited from entry, unless bound for an Iranian port. Deep-draught tankers, wishing to use the traffic separation zone in the restricted area, were obliged to submit a request to the Iranian Port and Shipping Organization 48 hours before departure.⁸⁸ Such inconvenient measures to neutral vessels could be difficult to justify in international law.⁸⁹

To ensure unimpeded passage in the shipping route in the Tunbs area (even if only as a temporary measure), and to minimize Iranian control, Iraq proposed an amendment to the regime of transit passage⁹⁰ so that the “regime also applies to the passage between islands situated near the international straits, if the IMO has designated shipping lanes lying near such islands.”⁹¹ According to the regime of transit passage there should be “no suspension of innocent passage through ... straits.”⁹² Apart from the fact that the Iraqi proposal failed to be adopted in the 1982 Convention, Iran—as a non-ratified for the convention—considered the regime of transit passage in LOS as “merely the product of *quid-pro-quo* which do not necessarily purport to codify the existing customs or established usage (practice) regarded as having an obligatory character.”⁹³ Therefore, towards pursuing this view, “only States parties to the Law of the Sea convention shall be

⁸⁸ *Persian Gulf Pilot* (1990 copy), *op. cit.*, n.14, at p.1; similarly, see copies 1984, 1986 and 1988. For an illustrative map, see the Admiralty Chart No. 2858.

⁸⁹ On the legality of the war zone, see Leckow, R., “The Iran-Iraq Conflict in the Gulf: The Law of War Zones,” 37 *ICLQ* (1988), at pp.634-6; On the British position from the Iranian war zone, see Warbrick, C., “The British position to the Gulf Conflict,” 37 *ICLQ* (1988), at p.427; Gray, C., “The British position with regard to the Gulf Conflict (Iran-Iraq): Part 2,” 40 *ICLQ* (1991), at pp.467-8. See also Peace, D.L., “Major Maritime Events in the Persian Gulf Between 1984-1991: A juridical Analysis,” 33 *VJIL* (1993), at p.547; Boczek, B.A., “Law of Warfare at Sea and Neutrality: Lessons from the Gulf War” 20 *ODIL* (1989), at pp.243-51.

⁹⁰ For further discussion on this regime, see Churchill and Lowe, *op. cit.*, n.82, Chapter 5; Moore, J. N., “The Regime of Straits and the Third United Nations Conference on the Law of the Sea,” 74 *AJIL* (1980), at pp.77-121; Reisman, W.M., “The Regime of Straits and National Security. An appraisal of International Lawmaking,” 74 *AJIL* (1980), at pp.48-76; Schachte and Bernhardt, “International Straits and Navigational Freedoms,” 33 *VJIL* (1993), at pp.530-89; Gilmore, *op. cit.*, n.83, at p.9, para.10.

⁹¹ Churchill and Lowe, *op. cit.*, n.82, at p.91.

⁹² Article 45(2) of the 1982 Convention. See also *Ibid.*, at pp.87-96.

⁹³ The Iranian declaration upon signature to the LOS. See *Law of the Sea Bulletin*, No. 25, June (1994), at p.29. For further discussion on the relation of the regime of transit passage and customary law, see Churchill and Lowe, *op. cit.*, n.82, at pp.93-4.

entitled to benefit from the contractual rights created therein.”⁹⁴ Thus, the Iraqi proposal would have no effect, at least as far as the passage in the shipping route between the two Tunbs islands is considered, even if it had been embodied in the Convention.

The entitlement of the three Islands to maritime zones

An island, as we have seen in Chapter One of this work, has been defined as “a naturally formed area of land surrounded by water, which is above water at high-tide.”⁹⁵ The entitlement of islands to maritime zones is not, in principle, questionable in international law.⁹⁶ Article 121(2) of the 1982 Convention, for example, assimilates islands to other land territory.⁹⁷ This entitlement, however, is questionable where the island is considered to be a rock which cannot sustain human habitation or economic life of its own. In this case, according to Article 121(3) of the 1982 Convention, the island “shall have no exclusive economic zone or continental shelf.” Two questions have arisen in respect to the application of Article 121(3). First, what is a rock? Second, what is the status of the Article in customary law? As we have seen in Chapter One, this Article was poorly drafted, and has consequently been subjected to criticism by a number of scholars.⁹⁸ Its status is also controversial.⁹⁹ If we accept that Article 121(3) reflects modern customary law, or if Iran and UAE ratify the 1982 Convention, would it apply to the present case?

In the light of the geographical data concerning Abu Musa, Greater Tunb and Little Tunb islands, the relevance of Article 121(3) to the present case would appear to arise only in relation to the entitlement of Little Tunb island to a

⁹⁴ *Law of the Sea Bulletin*, No.25, June (1994), at p.29.

⁹⁵ Article 10(1) of TSCZ 1958 (Article 121(1) of LOS 1982). This definition was adopted in Article 1 of the UAE Federal Law of 1993. No definition was given for islands in the Iranian offshore legislation.

⁹⁶ See Chapter One/Section Five.

⁹⁷ See also Article 1(b) of the 1958 Continental Shelf Convention and Article 10(2) of the 1958 Territorial Sea and Contiguous Zone Convention.

⁹⁸ See, for example, Churchill and Lowe, *op. cit.*, n.82, at p.41 & p.135. For discussion of the meaning of ‘rock’, see Brown, E.D., *Sea-Bed Energy and Minerals: The International Legal Regime*, vol. 1, Continental Shelf, 2nd ed, Martinus Nijhoff Publishers, the Netherlands (1992), at pp.37-8.

⁹⁹ See Chapter One/Section Five for more discussion on the status of Article 121(3).

continental shelf and an EEZ. This is because the Island is uninhabited and waterless. Hence, Little Tunb, it might be argued, cannot sustain human habitation of its own.¹⁰⁰ Professor Bowett, for example, has described “a naturally formed area of land surrounded by water” with this character as a rock and not as an island.¹⁰¹ Thus it appears to be of importance to determine the status of this Article in customary law, since the two parties are not yet bound by the LOS, and to determine the exact meaning of the term “rock.” The island of Little Tunb, it will be recalled, is situated between two mainlands in an area where the distance between the two coastlines is just 65 nautical miles. If the Island is to retain UAE’s sovereignty, it would be regarded as an island on the wrong side of the median line. Such an island, as will be seen, has often been denied any continental shelf effect. If however, the Iranian view on sovereignty prevailed, the Island also would be prevented, for equitable requirement,¹⁰² from generating any effect beyond its territorial sea limit, or at least would reduce its continental shelf area to a half effect limit. In the latter case, as we shall see, this would have no significant impact on the median line between the two sides.¹⁰³ As a result, an examination of the exact meaning of rocks and the status of Article 121(3) in customary law would appear in this instance to be only important from an academic viewpoint.

¹⁰⁰ Mr. Zadeh, an Iranian Scholar, described Little Tunb as a rock. See Zadeh, *op. cit.*, n.46, at p.107.

¹⁰¹ For the opinion of Professor Bowett, see Chapter One/Section Five above.

¹⁰² See below at p.303.

¹⁰³ *Ibid.*

Section Two

Islands in maritime boundary delimitation

This section is devoted to an analysis of the question of the effect of islands in maritime boundary delimitation. The purpose of this examination is to determine the cases where an island can be regarded as a special circumstance and, secondly, to identify the effect of islands in different geographical circumstances. Such an examination, moreover, will help to furnish the necessary legal background for our discussion on the effect of Abu Musa, Greater and Little Tunbs islands on a possible UAE-Iran boundary line. The discussion will be conducted on two levels; by reference to both the case law and state practice. The purpose of following these approaches is to identify the difference, or the similarity, between the case law—which is stressed as being based on the rules of law—and that of state practice, which is based on negotiation.

It is well known that states in their agreements can derogate, in the absence of *jus cogens* rules, from the rules of international law.¹⁰⁴ This flexibility and freedom that states enjoy, compared to the situation in case law, may suggest that there may be a difference between the two in dealing with similar circumstances. This, however, is not entirely true. The position in case law and in state practice, as we shall see, is largely the same in a number of incidents, especially in respect to continental shelf delimitation.¹⁰⁵ International adjudication, moreover, refers in some cases to state practice as enduring or justifying a particular delimitation. For example, in the *Anglo/French Arbitration*, the Court referred to state practice to uphold its decision to give half-effect continental shelf to the Scilly Isles.¹⁰⁶ Similarly, the Court in the *Dubai/Sharjah Award* cited a number of instances of

¹⁰⁴ *North Sea Case*, at para.72. There is some concern, however, about an equivalent right between states parties to LOS. For further details, see Marston, G., "The Stability of Land and Sea Boundary Delimitation in International Law," *Maritime Boundaries*, World Boundaries, vol. 5, Blake (ed.), London (1994), at p.156. See above at pp.118-9.

¹⁰⁵ As we saw in Chapter Two, there are not many cases concerned with territorial sea delimitation.

¹⁰⁶ *Anglo/French Arbitration*, at para.251.

state practice to support its finding to give no continental shelf effect to the Sharjah island of Abu Musa.¹⁰⁷

For the sake of clarity, in our discussion of state practice and the case law we shall distinguish between the case of an island whose sovereignty is undisputed and the case where it is disputed.

First: The effect of undisputed islands in delimitation¹⁰⁸

(1) The effect of islands in territorial sea delimitation

There are three geographical positions where the effect of islands might be different:

(a) Where an island lies close to the coastline under the same sovereignty

It is quite usual to find an island situated on the correct side of the median line being given full effect territorial sea, since it has been regarded as an integral part of the coastal frontage. Such a case can be found in the Netherlands/UK agreements of 1965. The Dutch islands of Walcheren, Schouwen, Texel, and Vlieland were given full effect when the equidistance line was drawn between the Netherlands and the UK.¹⁰⁹ Another example may be found in the Bahrain-Saudi Arabia Agreement of 1958 where two islands, the Saudi island of Kaskus and the Bahrain island of Khor Fasht, were given full effect territorial sea. The two Islands face each other, and each lies opposite its own mainland.¹¹⁰

(b) An Island situated midway between the parties

State practice in dealing with such a situation is to give the island a full effect territorial sea limit. An example may be found in the Iran-UAE agreement of 1974 where Sirri island was given an arc of about 12 nautical miles.¹¹¹ In case

¹⁰⁷ *Dubai/Sharjah Award*, at p.676. In similar vein, see *Tunisia v. Libya Case*, at para.129.

¹⁰⁸ For reasons pointed out elsewhere, our discussion is limited to the effect of islands in territorial sea delimitation and their effect in continental shelf delimitation. For the reason why there is no separate section for the effect of islands in contiguous zone and in EEZ boundary delimitation, see p.60 and p.294.

¹⁰⁹ *International Maritime Boundaries*, Charney & Alexanders (eds.), Martinus Nijhoff Publishers, the Netherlands (1993), at p.1866.

¹¹⁰ *Ibid.*, at p.1495.

¹¹¹ *Limits in the Sea*, Series No. 63, Continental shelf boundary Iran-UAE (Dubai), 1974.

law, the enclave effect is not unusual treatment for an island located on or close to the equidistance line. The Sharjah island of Abu Musa in the *Dubai/Sharjah Award*, for example, was attributed full effect territorial sea limit. This resulted in a bulge in the boundary line between the two parties.¹¹²

(c) An Island proximate to a foreign mainland

An island, depending on size, economic and geographical importance, which is proximate to a foreign mainland may either be ignored or taken into account. For example, in the Argentina/Uruguay boundary agreement of 1973, the Argentinean island of Martin Garcia, located on the Uruguay side, was ignored in the delimitation. This was because the parties did not want to hamper or jeopardize the reaching of an agreement between them by insisting upon an effect for a small and unimportant island such as the one in issue.¹¹³

This approach, however, has not been followed in areas where there are potential natural resources, like the Arabian Gulf. In such cases, claiming a territorial sea limit for any geographical features means having a larger share of the natural resources in the area. The Iran/Saudi Arabia Continental Shelf agreements of 1968 may be cited as an example where an island, namely the Iranian island of Fares, was given a 12 nautical miles territorial sea, in spite of the fact that it lies on the Saudi side of the median line. A glance at the map explains the reason for this treatment to the Fares island; the said Island is facing the Saudi island of Al-Arabian which is situated along the same longitude.¹¹⁴ Another example can be found in the boundary agreements between the Emirates of Sharjah and the Emirate of Umm al Qaywayn of 1964 (both Emirates are now members of the UAE Federation). The Sharjah island of Abu-Musa which is

¹¹² *Dubai/Sharjah Award*, at p.674. For an illustrative map, see figure 14.

¹¹³ See Articles 44 and 45 of the 1973 agreement. For the text of the agreement, see Charney & Alexanders, *op. cit.*, n.109, at p.767. See also below.

¹¹⁴ However, in reality, the effect of Fares island in extending the Iranian boundary was more than the effect of the Al-Arabian island on the Saudi boundary. The reason behind this is that both Islands, i.e. Fares and Al-'Arabia, lie on the Saudi side. See Charney & Alexanders, *op. cit.*, n.109, at p.1522. For an illustrative map, see figure 18.

situated on the wrong side of the equidistance line, i.e. opposite to the Umm al Qaywayn mainland, was given an arc of 12 nautical miles territorial sea.¹¹⁵

In case law the treatment of the Alcatraz island in the *Guinea/Guinea-Bissau Arbitration* of 1986 may be cited as an example, although not a good one, of the treatment of an island on the wrong side.¹¹⁶ In this Award, it will be recalled, the parties were in dispute over whether the 1886 agreement between France and Portugal, the former colonial powers, had established the maritime boundary between the two Guinea States.¹¹⁷ The Tribunal answered the question in the negative, and went on to determine the boundary between them. As far as the Guinea island of Alcatraz was concerned, the Tribunal gave the Island 2.25 nautical miles to the north. This limit in the northerly direction “marked the maximum claim by Guinea in its conclusions.”¹¹⁸ The Tribunal as a court of law is expected not to “decide more than it is asked to decide, and will not award by way of compensation or other remedy more than it is asked to award.”¹¹⁹ For that reason the Island was attributed a belt of 2.25 nautical miles territorial sea limit in the north. To the west, where there was no similar limitation from Guinea, the Tribunal considered it equitable to grant the Island in question “the 12 nautical miles provided for in the 1982 Law of the Sea Convention.”¹²⁰

These examples, it should be mentioned, are different from the case where an island lies very close to a foreign mainland. This is, as in the case of the Channel Islands, when the distance between the island and the foreign mainland does not exceed 24 nautical miles. In this case, a distinction needs to be drawn between the landward side and the seaward side. In respect to the landward side, where the coast of the island faces the coast of the foreign state mainland, a local median line is to be constructed in the area between the two coasts. In the *Anglo/French Arbitration*, where the Channel Islands were isolated from the French coast by

¹¹⁵ See Charney & Alexanders, *op. cit.*, n.109, at p.1550. For an illustrative map, see figure 15.

¹¹⁶ *Guinea/Guinea-Bissau Arbitration*, at para. 103.

¹¹⁷ Article 2 of the special agreement between Guinea and Guinea-Bissau, see 77 *ILR*, at p.643.

¹¹⁸ *Guinea/Guinea-Bissau Arbitration*, at para 111(a). See also para.16. It is worth mentioning here that a 2 nautical miles territorial sea limit in this direction was also proposed by Guinea-Bissau. See para. 17 of the Award.

¹¹⁹ Fitzmaurice, *op. cit.*, n.49, at p.524.

¹²⁰ *Guinea/Guinea-Bissau Arbitration*, at para. 111(a).

narrow waters, the Court was not asked to delimit the boundary in this area.¹²¹ This, however, did not prevent the Court from observing that in such narrow waters a median line appears to be a practical and an equitable boundary.¹²²

In state practice such a solution was adopted in a similar situation to that of the Channel Islands. The Australia-Papua New Guinea agreement of 1978 may serve as an example. In this agreement the two parties agreed to grant the Australian Islands situated off the Papua New Guinea coast 3 nautical miles territorial sea.¹²³ This limit in the landward side is in fact a median line between the Islands' coastlines and that of the Papua New Guinea, since the distance between the two coasts is about 6 nautical miles.¹²⁴ In respect to the seaward side the Australian Islands have been restricted to a 3-nautical-mile limit.¹²⁵

An alternative treatment of the effect of an island situated very close to a foreign mainland is to give the island no effect in the delimitation. As mentioned earlier, Argentina and Uruguay in their boundary agreement of 1973 agreed to disregard the Argentinean island of Martin Garcia, situated on the Uruguayan side of the agreed line. However, such a solution, in the absence of agreement, could not be based on law, but can be decided by a court applying an *ex aequo et bono* procedure, or can be recommended by a conciliation commission.¹²⁶

(2) The effect of islands in continental shelf delimitation

A general survey of state practice and international decisions indicates that islands in continental shelf delimitation have been variously attributed three

¹²¹ Article 2(1) of the arbitration agreement.

¹²² *Anglo/French Arbitration*, at para.22. Similarly, see *Dubai/Sharjah Award*, at p.674; *Oppenheim's, op. cit.*, n.83, at pp.613-4.

¹²³ See Article 3(2) of the agreement. The text of the agreement is reproduced in Charney & Alexanders, *op. cit.*, n.109, at p.941.

¹²⁴ Bowett, D.W., "Islands, Rocks, Reefs and Low-Tide Elevations in Maritime Boundary Delimitation," *International Maritime Boundaries*, Charney & Alexanders (eds.), Martinus Nijhoff Publishers, the Netherlands (1993), at p.147. Another example is the territorial sea agreement between France and Canada of 1972 in regard to the boundary between St Pierre-Miquelon and Newfoundland. The text of the agreement is reproduced in Charney & Alexanders, *op. cit.*, n.109, at pp.396-7.

¹²⁵ See Article 3(2) of the Australia-Papua New Guinea agreement of 1978.

¹²⁶ For further details on *ex aequo et bono* procedure and conciliation commission, see Chapter Seven.

different effects: (1) no effect; (2) partial effect; (3) full effect. Each outcome will now be examined.

(a) Islands given no effect

Although there is no doubt about the entitlement of islands to continental shelf rights, in some cases this entitlement may be denied. In reality, this depends primarily upon an island's geographical position in the area of delimitation. For example, if the island is situated on, close to, or on the wrong side of the median line zone, it would be denied any effect in continental shelf delimitation where this is necessary in order to avoid any disproportionate distorting effect on the overall result. This is usually done where the delimitation area is in a closed sea or semi-enclosed sea, or where the size of the delimitation area is insignificant.

Giving the island no continental shelf effect could be done by granting it an enclave of territorial sea only. State practice provides a number of instances for such treatment. For example, the treatment of Abu-Dhabi island of Diyénah in the Qatar-Abu-Dhabi agreement of 1969 is often cited in the literature as a case where an island was attributed an enclave effect of a territorial sea limit only.¹²⁷ This treatment is somewhat similar to the outcome given in case law for an island in a similar position. The case of Abu Musa island in the *Dubai/Sharjah Award* serves as a good example. The Court in this Award gave the Island no effect in the continental shelf delimitation between two adjacent Emirates. In the course of justifying its decision the Court said that giving no effect for continental shelf purposes to the said island "would preserve the equities of the geographical situation and would be consistent, for example, with comparable regional practice."¹²⁸ The Court went on to give examples of these practices.¹²⁹

¹²⁷ See, for example, Bowett, *op. cit.*, n.124, at p.143; Karl, D., "Islands and the Delimitation of the Continental Shelf: A framework for Analyses," 71 *AJIL* (1977), at p.661; Evans, M., *Relevant Circumstances and Maritime Delimitation*, Claredon Press, Oxford (1989), at p.149.

¹²⁸ *Dubai/Sharjah Award*, at p. 677.

¹²⁹ *Ibid.*

(b) Islands given partial effect

In some cases, giving full effect to an island that is situated between two mainlands would cause a disproportionate distorting effect on the result of delimitation. Equally, giving no effect would not result in an equitable delimitation. The Court of Arbitration in the *Anglo/French Arbitration* was faced with such a dilemma when it considered the effect of the British Isles of Scilly. These Isles are situated on the correct side of the median line, but 21 nautical miles from the mainland of England. They face the French island of Ushant, which is situated only 14 nautical miles off the French coast. The French and the English coasts are opposite each other, and an equidistance line, therefore, should be an equitable boundary between them. The location of the Scilly Isles resulted in the extension of the British coastal frontage farther into the Atlantic region than the French coastal frontage. The effect of the Scilly Isles was thus “to deflect the equidistance line on a considerably more south-westerly course than would be the case if it were to be delimited from the baseline of the English mainland.”¹³⁰ The Court of Arbitration raised the question of whether giving the Scilly Isles a full effect continental shelf would “distort the boundary and have disproportionate effect as between the two states.”¹³¹ The Court answered the question in the affirmative, and then concluded that:

the additional projection of the Scilly Isles into the Atlantic region does constitute an element of distortion which is material enough to justify the delimitation of a boundary other than the strict median line envisaged in Article 6, paragraph 1, of the Convention.¹³²

However, it was felt that it would be equally inequitable to give no effect to the said Isles since they already had a 12-mile fishery zone, which had been recognized by the French Government. In addition, the Scilly Isles are a geographical fact in the Atlantic region, of a certain size and population, and there is no question of equity completely refashioning geography.¹³³ The Court, as appears in the map reproduced below, attributed a half effect continental shelf

¹³⁰ *Anglo/French Arbitration*, at para. 243.

¹³¹ *Ibid.*, at para. 244.

¹³² *Ibid.*

¹³³ *Ibid.*, see also para. 249; *North Sea Cases*, at para. 91.

for the Scilly Isles in the delimitation. This half effect, the court said, was an “appropriate and practical method of abating the disproportion and inequity which [would] otherwise result from giving full effect to the Scilly Isles as a base-point for determining the course of the boundary.”¹³⁴

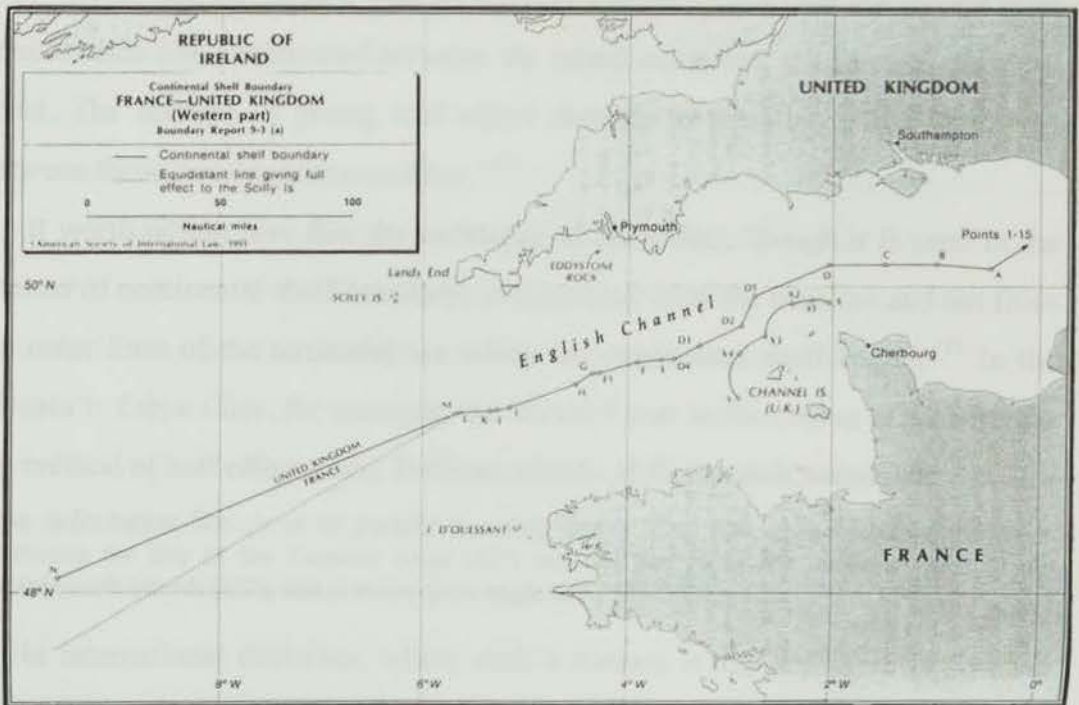


Figure: (26) Half effect continental shelf for the Scilly Isles.
Source: *International Maritime Boundaries*, at p.1746.

¹³⁴ Ibid., at para. 251, see also para. 248. More discussion on the Scilly Isles' half effect in later stages of this chapter.

Professor Bowett, commenting on the concept of ‘half effect’, wrote that the notion “was designated to reduce if not eliminate the assumed distorting effect of the island.”¹³⁵ A half effect continental shelf limit for an island, which was used for the first time in the Iran-Saudi Arabia agreement of 1968,¹³⁶ is in practice halfway between two equidistance lines. The first is an equidistance line between the two coastlines measured without reference to the island; and the second is an equidistance line constructed between the island coast and the foreign mainland coast. The method of giving half effect consists in drawing a line “mid-way between those two equidistance lines.”¹³⁷

It worth noting here that the technique of half effect, though it is used in the context of continental shelf boundary, is measured from the baseline and not from the outer limit of the territorial sea where the continental shelf begins.¹³⁸ In the *Tunisia v. Libya Case*, for example, the World Court in the course of elaborating the method of half effect to the Tunisian islands of Kerkennah stated that:

the delimitation line...is to be parallel to a line drawn from that point bisecting the angle between the line of the *Tunisian coast* (42°) and the line along the *seaward coast of the Kerkennah Islands* (62°), that is to say at an angle of 52° to the meridian.¹³⁹

In international decisions, where such a method is applied, there is no clear explanation of why a half effect continental shelf for an island is to be a mid-way line between two equidistance lines constructed from the baseline, and not from the outer limit of the territorial sea.¹⁴⁰ A possible explanation could be that the method of half effect, as the Court in the *Anglo/French Arbitration* stated, “consists in delimiting the line equidistant between the two coasts.”¹⁴¹ An equidistance line, it will be recalled, is a line “every point of which is equidistant from the nearest points of the baselines from which the breadth of the territorial

¹³⁵ Bowett, *op. cit.*, n.124, at p.140.

¹³⁶ Bowett, D., *The Legal Regime of Islands in International Law*, Oceana Publications Inc., New York (1979), at p.140. For discussion on the 1968 agreement, see Chapter Five.

¹³⁷ *Anglo/French Arbitration*, at para.251.

¹³⁸ Article 76 of the 1982 Convention.

¹³⁹ Italics added, *Tunisia v. Libya Case*, at para.129. See also *Anglo/French Arbitration*, at para. 251; *Gulf of Maine Case*, at para.222 of the Judgement and para.13 of the Technical Report.

¹⁴⁰ *Tunisia v. Libya Case*, at para.129; see also *Anglo/French Arbitration*, at para.251.

¹⁴¹ *Anglo/French Arbitration*, at para.251.

sea of each State is measured.”¹⁴² Furthermore, although the continental shelf began from the outer limit of the territorial sea, the distance of 200 nautical miles continental shelf limit is started from the baselines from which the breadth of the territorial sea of each state is measured. Finally, it is difficult to determine what the half effect continental shelf would be, if it were to be measured from the outer limit of the territorial sea, where the two states involved in the delimitation claimed different territorial sea limits.

Figure 27 below explains the process of measuring half effect for an island. This uncomplicated process makes the half effect technique the easiest and “the most ‘popular’ method of giving islands reduced effect,”¹⁴³ rather than a 25 per cent or 75 per cent effect. An example of giving half effect in state practice is the agreement between Iran and Saudi Arabia in respect to the effect of the Iranian island of Kharag.¹⁴⁴ The two parties, as we have seen, agreed to give the Island a half effect continental shelf limit.¹⁴⁵ Additional examples of giving half effect for an island can be found in the ICJ treatment to the Tunisian islands of Kerkennah in the *Tunisia v. Libya Case*. The Islands, which lie opposite the Tunisian mainland, were granted a half effect continental shelf. The Court justified this amount for the Kerkennah islands for the following reasons: (1) there were a number of examples in state practice in which only partial effect had been given to an island situated opposite to the coast; (2) the Kerkennah islands were close to the Tunisian coast;¹⁴⁶ (3) the Islands have an area of 180 square kilometres.¹⁴⁷ In a similar manner, the Chamber in the *Gulf of Maine Case* dealt with the Canadian island of Seal in the delimitation between the US and Canada. The Chamber enumerated the following reasons for attributing half effect: (1) Seal island is in

¹⁴² Article 6 of the Geneva Convention on the Continental Shelf of 1958.

¹⁴³ See Evans, *op. cit.*, n.127, at p.148.

¹⁴⁴ For the text of the agreement, see Charney & Alexanders, *op. cit.*, n.109, at p.1526. Similarly, in the Greece/Italy agreements of 1977, the parties agreed to give half effect to the Greek island of Strofades, which is small and far from the Greek mainland. See *Ibid.*, at p.1598.

¹⁴⁵ See Chapter Five for more details.

¹⁴⁶ The Islands are situated 11 nautical miles off the Tunisian coastline. This, however, did not characterize the Islands as coastal islands, to be used in calculating the length of the Tunisian coastline, like Jerba island.

¹⁴⁷ *Tunisia v. Libya Case*, at paras.12 and 129.

an important geographical position, in that it controls the entry to the Gulf of Maine;(2) although the Island is only two and a half miles long, it is inhabited throughout the year;(3) the Chamber rejected a full effect for the said Island, since that effect would be excessive and would result in cutting off an area from the US continental shelf.¹⁴⁸

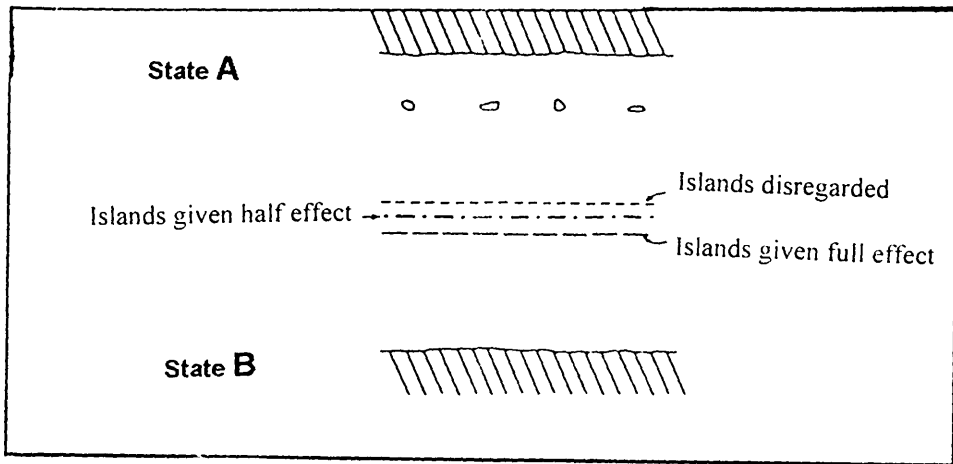


Figure: (27) A method of giving half effect to islands belong to State A.
Source: Map distributed at Workshop on Geographical and Technical Considerations in Maritime Boundary Delimitations. University Of Durham. International Boundary Research Unit. 17 July 1996.

¹⁴⁸ *Gulf of Maine Case*, at para.222. It is notable that Seal island was given half effect, unlike the Tunisian island of Jerba, despite the fact that it had been used, like Jerba island, in calculating the length of the Canadian coastline. The important geographical position of the Canadian Island might be the reason behind the difference in effect between the Canadian Island and the Tunisian island of Jerba. Otherwise this difference in treatment demonstrates nothing other than the difficulty of detecting any general rules in actual practice.

(c) Islands given full effect

Although in international law it is indisputable that both an island and a continental mainland can equally generate maritime zones, in practise this equality has not always been observed. As we have seen, the entitlement of an island has for some time been reduced or ignored in favour of a continental mainland. There were, however, two situations in state practice where this equal capacity has been maintained.

The first was where the island was not situated between two mainlands. The Thailand-India (Nicobar islands) agreement of 1978 can be cited as an example. The Indian islands of Nicobar, a remote island isolated 1275 kilometres from the Indian coastline, was agreed to have, in principle, full effect against the Thai coastline.¹⁴⁹ Another example may be found in the Norway-Denmark (Faroe islands) agreements of 1979. These Danish islands, isolated from Denmark's mainland, and situated opposite to the Norwegian mainland, were given, in principle, full effect in the said agreement *vis-à-vis* the Norwegian coastline.¹⁵⁰

The second situation in which an island would have full effect is where there is another island under the sovereignty of the other state, and thus the two islands would balance each other out. The US-Mexico agreement of 1978 granted full effect continental shelf to the US islands of San Clemente and San Nicolas. In return, the said agreement gave full effect to the Mexican island of Guadalupe.¹⁵¹

In case law where delimitation is based on law, an island, as in state practice, has often been afforded less, or no, effect on the continental shelf and EEZ boundary. A number of examples have been cited earlier. In spite of this, the Court of Arbitration in the *St. Pierre and Miquelon Award*,¹⁵² and the World Court in the *Jan Mayen Case*¹⁵³ have deviated from early practice and reasserted the equal capacity of an island and a continental mainland when they faced a

¹⁴⁹ For the text of the agreement, see Charney & Alexanders, *op. cit.*, n.109, at p.1440.

¹⁵⁰ *Ibid.*, at p.1717.

¹⁵¹ *Ibid.*, at p.444.

¹⁵² Between France and Canada.

¹⁵³ Between Norway and Denmark.

similar geographical situation to that of the Indian islands of Nicobar and the Danish islands of Faroe.¹⁵⁴ The ICJ for example stated that:

The coast of Jan Mayen, no less than that of eastern Greenland, generates potential title to the maritime areas recognised by customary law, i.e. in principle up to a limit of 200 miles from its baselines.¹⁵⁵

The justifications for the Court's position are that the islands involved in these two cases are ocean islands and not "an incidental feature in a delimitation between two mainland, and approximately commensurate, coasts."¹⁵⁶ Secondly, "there being nothing to the east of St.Pierre and Miquelon except the open waters of the Atlantic Ocean, there is more scope for redressing the inequities" as opposed to the case where the island is situated in narrow waters between two continental mainlands.¹⁵⁷

As a result, the French islands of St.Pierre and Miquelon, and the Norwegian island of Jan Mayen were found not to constitute special circumstances and thus were, in general, on an equal footing with the continental mainland in terms of the entitlement to generate maritime zones. The Court of Arbitration in this context stated that the "extent of the seaward projections will depend, in every case, on the geographical circumstances; for example, a particular coast, however short, may have a seaward projection as far as 200 miles, if there are no competing coasts that could require a curtailed reach."¹⁵⁸ The outcome in the *Jan Mayen Case*, however, was not strictly consisted with the Court's acknowledgement of the existence of an equal capacity between Jan Mayen coast and that of Greenland. In this case, as we have seen in Chapter Three, the Court considered the difference in length between the two coasts as a special circumstances within the meaning of Article 6. For this and other reasons,¹⁵⁹ as

¹⁵⁴ See above.

¹⁵⁵ *Greenland v. Jan Mayen Case*, at para. 70.

¹⁵⁶ *France/Canada Award*, at para.42; *Anglo/French Arbitration*, at para.200.

¹⁵⁷ *Anglo/French Arbitration*, at para.200. Likewise the case of Jan Mayen, *Greenland v. Jan Mayen Case*, at para.70.

¹⁵⁸ *France/Canada Award*, at paras. 45 and 70; *Greenland v. Jan Mayen Case*, at paras.70 and 80; see also Evans, M., "Less than an Ocean Apart: the St Pierre and Miquelon and Jan Mayen Islands and the Delimitation of Maritime Zones," 43 *ICLQ* (1994), at pp.689-90.

¹⁵⁹ E.g., to give equal access to fishing resources in the area of overlapping claim. *Greenland v. Jan Mayen Case*, at paras.72-76 and 92. See also Chapter Three/Section Two.

appears in the map below, it adjusted the equidistance line between the two coasts to the advantage of the Greenland.¹⁶⁰ The Court in doing so, was giving a decision which was incompatible with the doctrine of equal capacity that it had professed in the same judgement.¹⁶¹

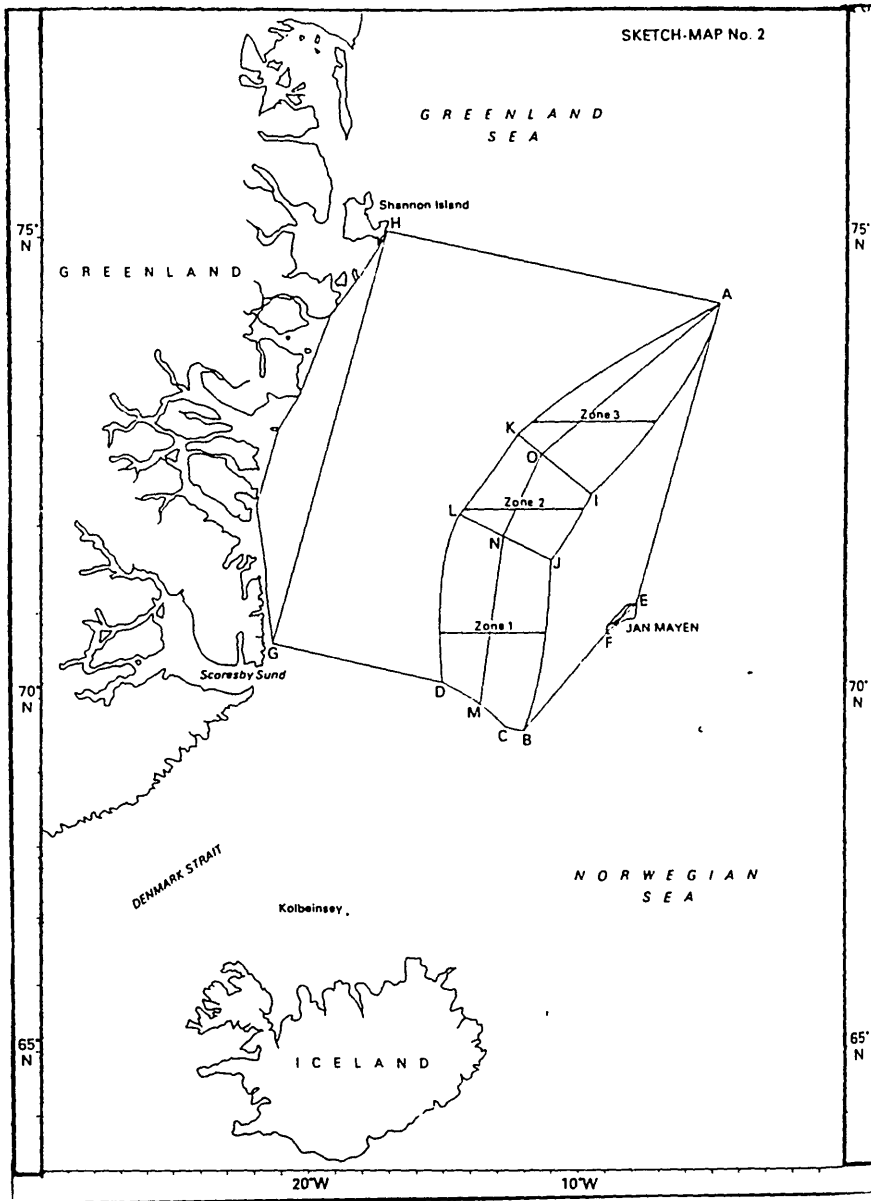


Figure: (28) Greenland-Jan Mayen boundary.
Source: ICJ Reports 1993, at p.80.

¹⁶⁰ *Greenland v. Jan Mayen Case*, at para.69. For further discussion on proportionality, see above at pp.142-6.

¹⁶¹ *Ibid.*, at para.70.

Second: The effect of a disputed island in the delimitation

In this case we can distinguish between two situations. The first is when the dispute about the sovereignty of the island is between the parties to the delimitation. The second, when the dispute about the sovereignty of the island is between one of the parties in the delimitation and a third state. In respect of the former one solution is to draw the boundary line and determine the sovereignty of the island. However, it is most likely that the island in this case will have reduced effect or no effect at all. Bowett, in this regard, remarked that this possible treatment for an island in such a case “may be the ‘price’ one party has to pay for having its sovereignty recognised.”¹⁶² The India/Sri Lanka agreement of 1974 may be cited as an example. Sri Lanka by this agreement secured its sovereignty over the Kachchantiva island, which lies in the median zone. Correspondingly Sri Lanka claimed no effect for the Kachchantiva island that could modify the median line between the two coastlines. In addition, Sri Lanka allowed Indian fishermen access to visit Kachchantiva island.¹⁶³ Another example is the island of Hans which is situated midway between Canada and Denmark (Greenland). The sovereignty over the island is disputed between the two states; in their maritime boundary agreement of 1973 the island was given no effect in delimitation.¹⁶⁴

An alternative solution, however, is to stop the boundary line short of the point where the disputed island may have an effect on the boundary line. The 1974 continental shelf agreement between Iran and UAE ended the agreed boundary line between them at point 5, that is, 14.54 nautical miles from the disputed island of Abu Musa.¹⁶⁵

In respect of the latter, the case where the dispute about the sovereignty of the island involves a third state, the disputed island, it might be argued, should have

¹⁶² Bowett, *op. cit.*, n.124, at p.136; See also Bowett, D.W., “The Dubai/Sharjah Boundary Arbitration of 1981,” 65 *BYBIL* (1994), at p.130.

¹⁶³ Charney & Alexanders, *op. cit.*, n.109, at pp.1416-7. For an illustrative map, see Figure 4.

¹⁶⁴ *Ibid.*, at pp.380-5 and see also p.372.

¹⁶⁵ For further examples, see Oxman, B., “Political, Strategic, and Historical Considerations,” *International Maritime Boundaries*, Charney & Alexanders (eds.), Martinus Nijhoff Publishers, the Netherlands (1993), at pp.20-1. For an illustrative map and discussion on the UAE-Iran agreement of 1974, see Chapter Four/Section One.

no effect in the delimitation. This is because its ownership is not certain for the claiming or the controlling state. It is, however, difficult to find an example in state practice to support the denial of the island's effect because of a dispute over its ownership. However, the converse is not true. The Fiji-France (New Caledonia) agreement of 1983 (not yet in force) may serve as an example of giving effect to an island whose ownership by one party to the agreement is not certain. The French islands of Matthew and Hunter (also claimed by Vanuatu), in this agreement, were given full effect in drawing the equidistance line between the French (New Caledonia) and Fijian economic zones boundary.¹⁶⁶

In the *Dubai/Sharjah Award*, the Government of Sharjah declared, with regard to the effect of an island the sovereignty of which is disputed, that it was “aware of no case where a boundary agreement between two States has ignored the presence of an island which was claimed both by one party only to the agreement, and a third State.”¹⁶⁷ The Court of Arbitration clearly did not uphold the Sharjah argument, though it gave a full effect territorial sea limit to the island of Abu Musa, despite the fact that there was a dispute about the sovereignty of the island between Iran and Sharjah (UAE). The precise reason behind the attribution of this full effect territorial sea to the Abu Musa island, it might be suggested, was that the Island already had a 12-mile territorial sea limit. This limit was recognized by Iran which was, and still is, in dispute with Sharjah over the sovereignty of the Island.¹⁶⁸ Moreover, Dubai itself did not argue for no effect to be given to the Abu Musa island, rather it proposed a three nautical miles territorial sea for it.¹⁶⁹ Therefore, the decision of the Court of Arbitration to give an effect to the island of Abu Musa—whose sovereignty is claimed by Iran and Sharjah—cannot be used as conclusive evidence to support an effect for an island whose ownership is disputed by one party to the negotiation and a third state.

¹⁶⁶ Charney & Alexanders, *op. cit.*, n.109, at p.1000.

¹⁶⁷ *Dubai/Sharjah Award*, at p.666.

¹⁶⁸ Article 3 of A ‘Memorandum of Understanding’ between Iran and Sharjah of November 1971. The Memorandum is re-printed in Al-Baharna, *op. cit.*, n.63, at p.345.

¹⁶⁹ *Dubai/Sharjah Award*, at p.664 and p.674.

It might be suggested that here the island should be ignored until the question of its sovereignty is resolved. An illustration of this point would be of value. Suppose that states **A** and **B** are negotiating an agreement to determine their respective maritime boundaries. The parties have agreed to give no effect to state **A**'s island. This is because of a dispute about the sovereignty of the island between state **A** and state **C**. In the delimitation agreement between states **A** and **B**, the parties need to indicate that, if there is a future settlement to the sovereignty question over the island between states **A** and **C**, the boundary line between states **A** and **B** would be adjusted to be consistent with the settlement of the territorial dispute between states **A** and **C**. Otherwise the boundary line between states **A** and **B** should be terminated at a point before the area of disputed sovereignty; the island. The Australia-France agreement of 1982 may serve as an example. The boundary line, as traced in the map reproduced below, was terminated at point R22, which was situated about 220 nautical miles from the disputed islands of Matthew and Hunter (both claimed by France and Vanuatu). This was because going any further would prevent Australia from avoiding any involvement in "the territorial dispute between France and Vanuatu over the ownership of Matthew and Hunter islands which are controlled by France but claimed by Vanuatu."¹⁷⁰

¹⁷⁰ Charney & Alexanders, *op. cit.*, n.109, at pp.911-3; see in particular Article 3(2).

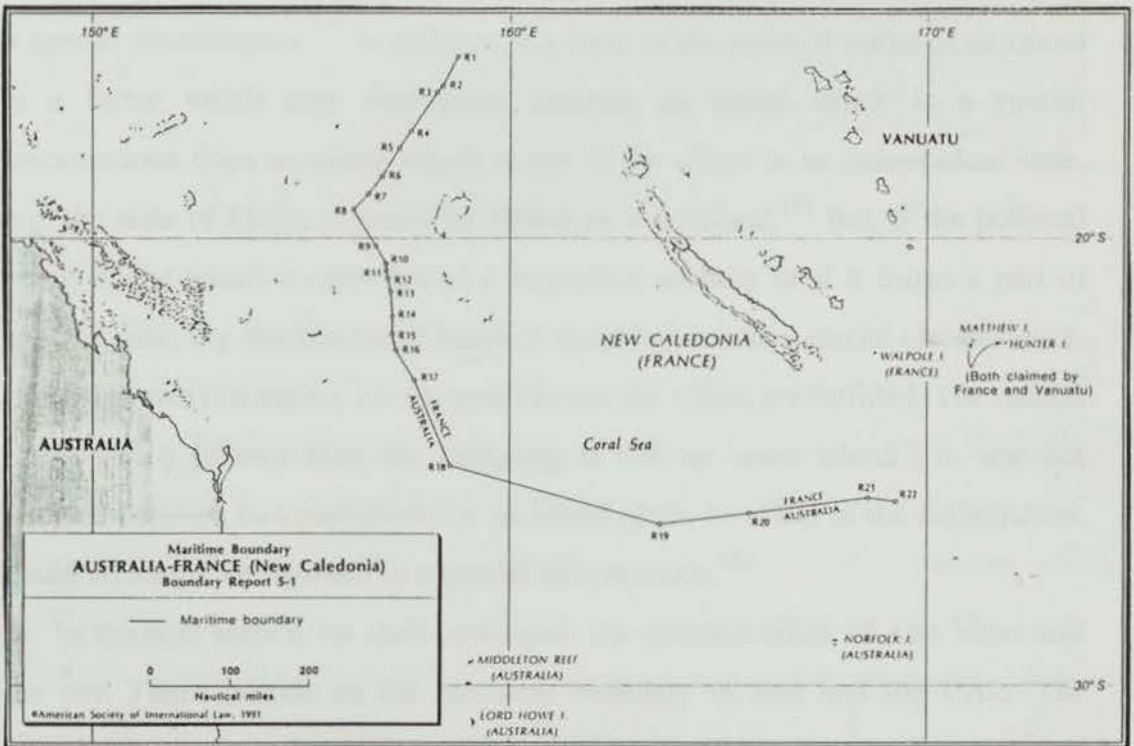


Figure: (29) Australia-France maritime boundaries.
Source: *International Maritime Boundaries*, at p.910.

An island as a special circumstance

In order for an island to be regarded as a special circumstance two conditions must be fulfilled. Firstly, its position needs to be between two mainlands, either opposite or adjacent. Secondly, the island would cause disproportionately distorting effects, if it were to be given full effect in the delimitation. Hence, the position and the distorting effect of an island together determine the legal character of a particular island as to whether or not it is considered as constituting a special circumstance.¹⁷¹ In addition, the issue of the political status of an island is a factor which may distinguish between an island which is a special circumstance from an island which is not. If the island is an independent state, e.g. the state of Malta, it would be treated as a mainland.¹⁷² But, if the political status of the island is only that of a dependent territory or if it forms a part of another state, e.g. the Channel Islands, it could be seen as a special circumstance, if the first two conditions, i.e. the position and the effect, are fulfilled. The natural result which follows from the foregoing is that an ocean island (i.e. one not situated between two mainlands) or an island given no effect in the delimitation, could no longer be regarded as a special circumstance.¹⁷³

In the next section we shall investigate the possible effect of Abu Musa and the two Tunbs islands on the maritime boundary of Iran and the UAE. The Islands, as mentioned, are situated in a semi-enclosed sea between the coasts of opposite states.¹⁷⁴ And, as we shall illustrate in the following section, any effect these islands may have, would have some knock-on effect on the two sides' offshore boundaries. These two factors would cause these three Islands to be regarded as special circumstances that may justify a departure from the median line between the two states.

¹⁷¹ O'Connell, *op. cit.*, n.83, at p.718. See also Judge Schwebel's separate opinion in the *Greenland v. Jan Mayen Case*, at p.123.

¹⁷² *Libya v. Malta Case*, at para. 53. See also Evans, *op. cit.*, n.127, at p.137.

¹⁷³ Similar view was held by Evans, *op. cit.*, n.127, at p.149.

¹⁷⁴ See Section One for further geographical details.

Conclusion

Our discussions on the effect of islands in maritime boundary delimitation show the similarity between state practice and case law in addressing the question of islands in delimitation.¹⁷⁵ This consistency between the two may improve the degree of predictability and compatibility in the law of maritime boundary delimitation.¹⁷⁶ Moreover, our examination of state practice and case law in this section indicate some common elements, although these do not clearly show how much effect should be given to an island to guide decision making,¹⁷⁷ in the matter of what effect needs to be attributed to an island when it is constituted a special circumstance. Generally speaking, this effect might be full, partial or nothing at all. We shall now list these elements for each effect:

(a) Giving no effect to the island

An island is ignored:

(1) If the geographical feature is merely a rock, which cannot sustain human habitation or an economic life of its own, the island, for the parties to the 1982 Convention, has no continental shelf or EEZ; (2) If it faces another island under the sovereignty of the opposite or adjacent state, the two islands may cancel each other out and have no effect in order to create a simple median line; (3) If the pre-existing regional practices give no effect to an island in that region, the island might have no effect for the continental shelf.

(b) Giving full or partial effect

An island is attributed a full or reduced effect:

¹⁷⁵ This was specially clear in regard to continental shelf delimitation where almost all the existing case law involves a dispute on the continental shelf boundary.

¹⁷⁶ See the conclusion of Chapter Three.

¹⁷⁷ In this regard it is interesting to quote the statement of Judge Oda in his dissenting opinion in the *Tunisia v. Libya Case*: "It must be admitted that it would be difficult, if not impossible, to devise a general formula applicable to all cases in such a way as to indicate the shape of any coastline, or the nature (size, economy, distance from mainland, etc.) of any island, to be wholly or partially disregarded. The geographical circumstances will have to be evaluated in each case in the light of what is regarded as representing equity, to be verified by proportionality between the continental shelf areas assigned and the lengths of the relevant coasts." See *ICJ Reports 1982*, at p.267, para.176; similarly, Judge Weeramantr's separate opinion in the *Greenland v. Jan Mayen Case*, at p.244, para.109; Bowett, *op. cit.*, n.136, at p.42; *Oppenheim's, op. cit.*, n.83, at pp.613-4.

- (1) If the regional practices acknowledge this effect to similar islands in that region.
- (2) If it has significant size, population or potential resources.
- (3) If it is situated on the correct side of the median line, and not too close to it.
- (4) If it has an important geographical position.
- (5) If the full or partial effect will not cause a disproportionately distorting effect.
- (6) If there is another island on the opposite side of the median line lying under the sovereignty of the opposite or adjacent state, both islands may balance each other and have the same effect, either full or partial.
- (7) If the island already had a certain limit for one of its maritime zones which had been recognized by the neighbouring states.¹⁷⁸

(c) Giving an enclave

An island is given an enclave if it is situated on or close to the median line or on the wrong side of the median line, and if giving full or partial effect would result in cutting off an area belonging to another state. Finally, adopting the enclave solution is an implicit rejection of the equal capacity to generate maritime space between the coast of an island and that of a continental mainland.¹⁷⁹ This was possibly the reason why the Court in the *St Pierre and Miquelon Award*, was unwilling to adopt the enclave solution, and thus it rejected the Canadian argument to restrict the effect of the French Islands to the west within an enclave of 12 nautical miles limit.¹⁸⁰ Geoffrey Marston in explaining the Court's position wrote that the Court acceptance of equal capacity between the two coasts "to generate maritime space, made it almost impossible for the court to cut down (amputer) SPM¹⁸¹ to a mere territorial sea."¹⁸²

¹⁷⁸ For example, the Channel Islands already had a fishery zone. Similarly, Abu Musa island, in the *Dubai/Sharjah Award*, had a 12-nautical-mile territorial sea.

¹⁷⁹ See above.

¹⁸⁰ *French/Canada Award*, at para.70. The Court considered an additional belt of 12 nautical miles represented "a reasonable and equitable solution," and "would meet to some degree the reasonable expectations of France of title beyond the narrow belt of territorial sea." See paras.69 and 68.

¹⁸¹ *St Pierre-Miquelon*.

¹⁸² Marston, G., "St Pierre-Miquelon Arbitration," 17 *Marine Policy* (1993), at p.166.

Section Three

The effect of the three Islands

The effect of Abu Musa and the two Tunbs islands upon the median line depends primarily upon their legal status. Since the focus of this work is the maritime boundary and not the question of sovereignty, the task of determining where sovereignty over the three islands properties lies is beyond its scope.¹⁸³ However, it is possible to address the delimitation issue in the context of the two parties' positions on the sovereignty question. In such a case two likely scenarios are suggested:¹⁸⁴

- (1) The UAE secures sovereignty over the Islands and Iran, therefore, drops its claims and withdraws from them;
- (2) Iran gains the Islands and the UAE gives up its demands to have its sovereignty over them restored.

Each possible scenario has its own impact upon the median line between the two neighbouring states. This median line is the provisional boundary line between the two parties' continental shelf and exclusive economic zone limit.¹⁸⁵ Due to the fact that the width between the two sides of the Gulf is increasing in a westerly direction, the median line between the UAE and Iran constructed without reference to the three Islands is a line every point of which is about 28.5 (in Greater Tunb area) and about 32.5 nautical miles (in Little Tunb area) and about 36.715 nautical miles (in Abu Musa area) from each coastline.

¹⁸³ A number of writers have discussed the question of sovereignty, e.g. Al-Bdwly, *op. cit.*, n.7; see also Al Roken, M., "A Historical And Legal Dimensions Of The United Arab Emirates-Iran Dispute Over Three Gulf Islands," *Attaawun Quarterly Journal*, Department of Information, The General Secretariat of the GCC., Saudi Arabia (1992), at pp.13-28. For the Iranian view, see Davoud H. Bavand, *The Historical, Political and Legal Bases of Iran's Sovereignty over the Islands of Tunb and Abu-Musa*, Internet Concepts Inc., New York (1994); Amirahmadi H. (ed.) *Small Islands, Big Politics*, Macmillan, USA (1996).

¹⁸⁴ This does not mean that there are no other possible scenarios, e.g., joint sovereignty. However, in our discussion we will be limited to the two scenarios suggested in the text, since these possibilities are the only two advanced by the Iranian and the UAE's authorities.

¹⁸⁵ See the provision of Article 19 of the Iranian Law and Article 23(2) of the UAE Law. For more details, see Chapter five.

The entitlement of an island to maritime zones in international law extends, as we have seen, to the territorial sea, the contiguous zone, the exclusive economic zone and the continental shelf. Our discussion here, however, is limited to their territorial sea and continental shelf effect in a possible UAE-Iran continental shelf boundary delimitation. This is because a single boundary line for the continental shelf and the EEZ boundaries was adopted by Iran¹⁸⁶ and the UAE.¹⁸⁷ Moreover, a delimitation of an EEZ boundary will automatically bring about delimitation of a contiguous zone boundary, since the latter forms part of the former.

Now we shall turn to examine the effect of Abu Musa, Greater Tunb and Little Tunb in respect of a territorial sea and continental shelf boundary in each of the two scenarios described above.

(1) The territorial sea

In general, where the distance between an island and the coast of an opposite or an adjacent state is 24 nautical miles or more, entitlement to a 12 nautical miles territorial sea limit is not questionable.¹⁸⁸ However, when the distance is less than 24 nautical miles, the median line system, in some cases, is the boundary line, whereas in other cases a modified median line is a more appropriate and equitable boundary line. This was clearly stated by the Court of Arbitration in the *Dubai/Sharjah Award*, in respect to the entitlement of Abu Musa island to a 12 nautical miles territorial sea limit. The Court in this regard indicated that:

Abu Musa is an island in the mid-Gulf which is, in the view of this Court, entitled *ex principio* to a belt of territorial sea quite independently and separately from either the actual or potential continental shelf claims of neighbouring States. The entitlement of an island to a belt of territorial sea does not of course prejudice *how much* territorial sea the island is entitled to. That is a question which will arise, for example, if the entitlement to territorial sea of an island affects its territorial sea boundary with another adjacent or opposite State. Such is not the case with the island of Abu Musa; here there is no question of an equidistance territorial sea boundary between the island and adjacent or opposite States, or of the examination of 'special

¹⁸⁶ See the Iranian statement before the UNCLOS III, *Official Records*, vol. I, at p.72, para.22; see also the Iranian EEZ Proclamation of 1973. For further information on this proclamation, see Chapter Five/Section One.

¹⁸⁷ Article 3 of the UAE declaration of 1980. For more discussion on the notion of single boundary line, see Chapter Three/Section One.

¹⁸⁸ See Chapter One/ Section Five.

circumstances' which might give rise to equitable considerations with respect to the territorial sea boundary of Abu Musa.¹⁸⁹

The territorial sea limit of the disputed Islands, namely, Abu Musa and the two Tunbs islands, in this case should be considered in the two possible scenarios. This, however, makes no significant difference to the island of Abu Musa, since it is located mid-way between the two parties. Very likely a third party applying international law would give that Island a full effect territorial sea limit, irrespective of whether it was allocated to the UAE or Iran.¹⁹⁰ In doing so, the third party would be endorsing the decision of the Court of Arbitration in the *Dubai/Sharjah Award*, and at the same time be upholding the mutual recognition of Iran and Sharjah of a 12 nautical miles territorial sea for the said Island.¹⁹¹ Moreover, a full effect territorial sea limit would be consistent with comparable regional practice as applied to the islands of al-Arabiyyah and Farise in the Saudi Arabia-Iran agreement of 1968.¹⁹²

The case of the two Tunbs is quite different. This is because they are located close to the Iranian mainland. Thus, if Iran obtained sovereignty over them, they would be viewed as islands proximate to their own mainland coast. In delimitation, this case usually causes no difficulty, and thus the two Islands would be allocated a full effect territorial sea limit. Professor Bowett in this regard wrote that:

It is not unusual to find islands lying close to a mainland, and under the same sovereignty, being given full effect. Because of their proximity, they are regarded as integrated with the mainland.¹⁹³

¹⁸⁹ *Dubai/Sharjah Award*, at p.674. See also *Anglo/French Arbitration*, at para.22; Jennings, R.Y., "Equity and Equitable Principles," 42 *Ann Suisse De Droit International* (1986), at p.29; Bowett, *op. cit.*, n.136, at pp.34-44.

¹⁹⁰ See below for the need to construct a local median line to the south-east of Abu Musa island between its territorial sea and the Tunbs islands group territorial sea where the sovereignties over the three Islands do not fall within one party.

¹⁹¹ Article 3 of the Memorandum reads:

"Iran and Sharjah recognized the breadth of the Island's territorial sea as twelve nautical miles."

¹⁹² For more information on this agreement, see Chapter Five.

¹⁹³ Bowett, *op. cit.*, n.124, at p.137. In a similar vein, Padwa held that it seems reasonable to include for the purpose of territorial sea measurement, islands which "could be fairly considered an integral part of the coastal domain." See Padwa, D.J. "Submarine Boundaries," 9 *ICLQ* (1960), at p.647.

However, were the UAE to restore its sovereignty over the two islands, they would be characterized as islands proximate to a foreign mainland. On the landward side, facing the Iranian coastline, where the distance is 20 nautical miles in Little Tunb and 15 nautical miles in Greater Tunb, a local median line may be established between the Islands' coastlines and the Iranian coastline.¹⁹⁴ On the seaward side, the two Islands (see the map below) would most likely be given an enclave of 12 nautical miles limit.

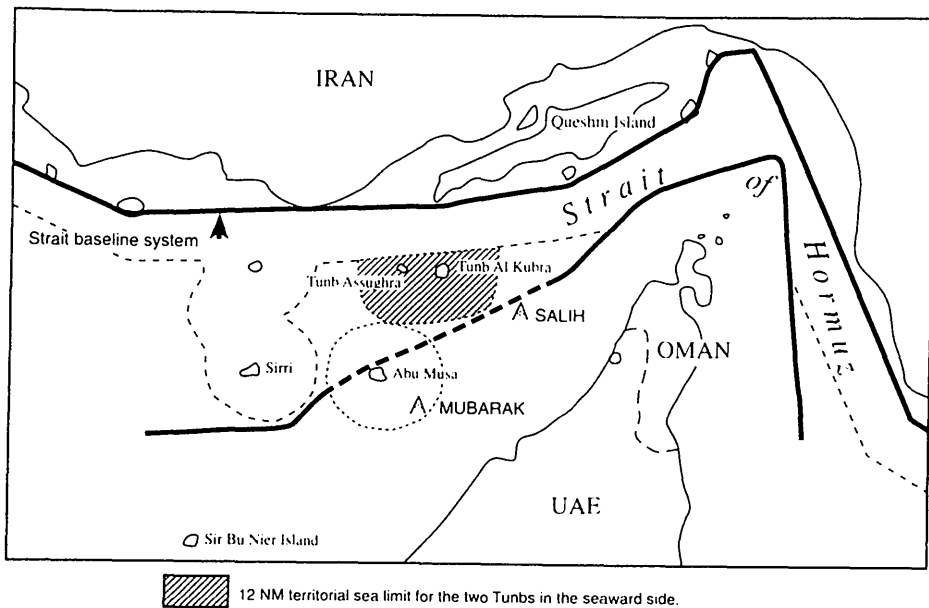


Figure: (30)
Source: The Author.

¹⁹⁴ The Court of Arbitration in the *Anglo/French Award* acknowledged the equity of constructing a median line in the narrow waters between the coast of the Channel Islands and the French coast; see the Award at para.22. For further examples, see above in Section Two. For the possibility of formulating a general rule for the effect of islands, see above at note 77.

The most compelling precedent of relevance is the Channel Islands in the *Anglo/French Arbitration*.¹⁹⁵ In this Award the Court of Arbitration gave the Channel Islands a three nautical miles territorial sea limit¹⁹⁶ in the northern and western sectors of their coast towards the English coastline, despite their being on the French side of the median line.¹⁹⁷ The three nautical miles limit at that time, it must be noted, was the full effect territorial sea limit under the British laws.¹⁹⁸

Towards the southwest of the two Tunbs islands is the island of Abu Musa. In this case a local median line would be constructed between the two Tunbs territorial seas and the Abu Musa island territorial sea, since the distance between the two baselines is about 20 nautical miles. Needless to say, this median line is necessary only where the Iranian view on sovereignty of Abu Musa prevails.¹⁹⁹

(2) The continental shelf

As far as Abu Musa island is concerned the location of sovereignty would, as with the territorial sea, be irrelevant, in respect to its entitlement to a continental shelf effect in the delimitation of the boundary between Iran and UAE. It is submitted that the Island should have no effect beyond its territorial sea limit. Otherwise, a disproportionate and exaggerated entitlement to maritime space between the two parties would result. Such a distorted effect of the Island may qualify it as being a special circumstance and thus requiring special treatment to eliminate this effect. This could be done by giving the Island an enclave effect of a territorial sea limit only. The enclave effect, Evans stated, is the appropriate solution for islands that are located close to, or on the wrong side of the median

¹⁹⁵ For the reasons why it is the most compelling precedent of relevance, see p.299.

¹⁹⁶ In addition to a nine nautical miles continental shelf limit. This meant that the Channel Islands were attributed an area of 12 nautical miles. See in this relation the remarks of Professor Brown, *op. cit.*, n.93, at p.120. See also below for further discussion on the effect of the Channel Islands.

¹⁹⁷ *Anglo/French Arbitration*, at para. 202.

¹⁹⁸ The British Government, by the Territorial Sea Act of 1987, extended the breadth of the British islands' territorial sea limit to 12 nautical miles. The provision of this Act, however, does not apply to the Channel Islands. See Article 4(4) of the Act. The Territorial Sea Act of 1987 is reproduced in *New Direction in the Law of the Sea*, vol.I, Simmonds K.R. (ed.), New Serial, Oceana Publications Inc., London, Released 88-1, issued in March 1988.

¹⁹⁹ Were Iran to obtain sovereignty over the two Tunbs and the UAE to restore its sovereignty over Abu Musa island, the need to construct a local median line between the Tunbs group and Abu Musa would remain the same.

line.²⁰⁰ In similar vein, Karl held that an island located close to the median line “is entitled only to a territorial sea and [is] not to be used as a basepoint or given any other significant effect in a delimitation.”²⁰¹ Furthermore, M.A. Movahned, one of Iran's negotiators on continental shelf delimitation, has emphasized that, with the exception of Kharg island “no island in the Gulf should be given any continental shelf rights.”²⁰²

Interestingly, the Island itself was subject to a legal examination in the course of the *Dubai/Sharjah Award*. The Court of Arbitration, it will be recalled, was charged with the task of determining the course of the boundary line between the land and maritime boundary of two member Emirates of the UAE's Federation. The island of Abu Musa was located close to the equidistance line between Sharjah and Dubai. The Court of Arbitration rejected Sharjah's claim for a half effect continental shelf for the Island. In justifying its decision the Court held that:

To give no effect to the continental shelf entitlement of the island of Abu Musa would preserve the equities of the geographical situation and would be consistent, for example, with comparable regional practice as applied to the island of Al-Arabiyyah and Farsi in the Saudi Arabian-Iranian agreement of January 1969,²⁰³ and Dayinah in the Abu-Dhabi-Qatar agreement of March 1969,²⁰⁴ where the continental shelf rights of islands were limited to coincide with their respective territorial waters, but not used as base points for the purpose of constructing median or equidistance boundaries in respect of the continental shelves between opposite or adjacent States.²⁰⁵

So much for the entitlement of Abu Musa island. Now we must examine the entitlement of the two Tunbs islands for a continental shelf effect in the delimitation between Iran and the UAE. Whereas the entitlement of Abu Musa island for a continental shelf effect should be zero, irrespective of the delimitation of sovereignty, the entitlement of the two Tunbs islands might be different—due to their proximate location to the Iranian mainland—according to whether they

²⁰⁰ Evans, *op. cit.*, n.127, at p.149.

²⁰¹ Karl, *op. cit.*, n.127, at p.658.

²⁰² Quoted from Amin, S.H., “Law of the Continental Shelf: The Gulf Example,” 27 *NILR*, (1980), at p. 341.

²⁰³ For further discussion on this agreement, see Chapter Five/ Section One.

²⁰⁴ For further discussion on this agreement, see Chapter Four/ Section One.

²⁰⁵ *Dubai/Sharjah Award*, at p.677.

come under UAE sovereignty or under that of Iran. Therefore it is necessary to examine the effect of the two islands in each scenario separately.

(a) Continental shelf effect of the two Tunbs islands if the UAE were to restore its sovereignty

A very strong argument exists for the two Islands having no effect beyond their territorial sea limit in these circumstances, since they are located on the wrong side of the median line. An opposing argument, as illustrated in the map below, would produce a substantial diminution of the area of continental shelf which would otherwise accrue to Iran. Again the case of the Channel Islands is the most compelling precedent of relevance.²⁰⁶ The Channel Islands, it will be recalled, located in the English Channel are under British sovereignty, but situated within the arms of a gulf on the French coast and only a few nautical miles distant from that coast. In other words, they are situated on the wrong side of the median line. The Court found the presence of these Islands would, *prima facie*, constitute a special circumstance, which justified a delimitation other than the median line.²⁰⁷ The Court of Arbitration in that Award restricted the continental shelf effect of the Channel Islands within their potential 12 nautical miles territorial sea limit, and rejected the British government's claim to give the Islands any further continental shelf effect beyond that limit.²⁰⁸ Thus the Channel

²⁰⁶ Although some recent cases in case law may appear at first glance to be relevant, since they contain the question of an effect for an island (like the case of the St. Pierre et Miquelon Arbitration of 1992), they are in fact different from the present case. This difference was been highlighted at p.284.

²⁰⁷ *Anglo/French Arbitration*, at para.196.

²⁰⁸ The Court of Arbitration found that the proper effect for the Channel Islands is "to enclose them in an enclave formed, to their north and west, by [a zone of seabed and subsoil extending 12 nautical miles from the baselines of the two Bailiwicks] and, to their east, south and south-west by the boundary between them and the coasts of Normandy and Brittany, the exact course of which it is outside the competence of the Court to specify." *Anglo/French Arbitration*, at para. 202. The rationale for the Court's decision was as follows: 1- Their position on the wrong side would result in a "substantial diminution of the area of continental shelf which would otherwise accrue to the French Republic", if they were attributed full effect; see para. 196.

2-The size and the importance of the Channel Islands would result in an inequitable delimitation, if the said Islands were ignored. Interestingly, the French Republic itself did not argue for no effect to be given to the Islands. Rather it proposed a six-mile enclave for them; see paras. 187 and 150.

3- The Channel Islands already had a 12 nautical miles fishery zone, which was expressly recognized by the French Republic; see para.187.

Islands had, in effect, been given no continental shelf. Professor Bowett, in his highly critical remarks on the Award, noted that the Channel Islands had been considered by the Court of Arbitration as special circumstances. This “was for their geographical location, as isolated islands, on the wrong side of the median line and between states which were otherwise in a situation of approximate geographical equality, which seemed to the Court to qualify the islands as ‘special circumstances’ and to be *prima facie*, creative of inequity.”²⁰⁹

However, Professor Brown, although he agreed with the Court that the Channel Islands constituted special circumstances, opposed the conclusion of the Court in giving the Islands in effect no continental shelf limit.²¹⁰ He wrote that the decision of the Court was hard to justify, or to “square with Article 1 of the Geneva Convention on the Continental shelf and its endorsement by the ICJ as declaratory of international customary law.”²¹¹

There is no room here to challenge Professor Brown’s argument that Article 1 of Convention on the Continental shelf reflects present day customary law,²¹² and thus the entitlement of islands to a continental shelf is well established.²¹³ But the presence of the Channel Islands in that particular situation “disturbs the balance of the geographical circumstances which would otherwise exist between the Parties in this region as a result of the broad equality of the coastlines of their mainlands.”²¹⁴ Therefore, it was necessary to minimize the knock-on effect of the location of these Islands being close to the French coastline. The Court of Arbitration found this could be done by restricting the effect of these Islands within their potential territorial sea limit.

²⁰⁹ Bowett, *op. cit.*, n.136, at p.204.

²¹⁰ This is because, in his view, 9 nautical miles of continental shelf (which the Court had decided for the Channel Islands, in addition to its 3 nautical miles territorial sea limit) the United Kingdom could have obtained independently of the Arbitration, “by claiming the [12 nautical miles] territorial sea as had been claimed by France since 1971.” See Brown, *op. cit.*, n.93, at p.120.

²¹¹ *Ibid.*

²¹² *North Sea Cases*, at para. 63.

²¹³ *Dubai/Sharjah Award*, at p.675.

²¹⁴ *Anglo/French Arbitration*, at para. 183.

Likewise, the presence of the two Tunbs islands on the wrong side of the median line in a rich and semi-enclosed sea, would result, as appears on the map below,²¹⁵ in depriving Iran in the Tunbs islands sector of any continental shelf area were the two Islands to have any effect beyond their territorial sea limit. In addition to the foregoing, giving the two Tunbs islands no effect for the continental shelf would be consistent with pre-existing practice in the Gulf. The case of the Iranian island of Farise in the Saudi Arabia-Iran agreement of 1968 may be cited as an example of preventing an island situated on the wrong side of the median line from having any effect beyond its territorial sea limit.²¹⁶

(b) Continental shelf effect of the two Tunbs islands were Iran to gain the Islands

Whereas the entitlement of the two Tunbs islands to a territorial sea belt is the same, their entitlement to a continental shelf limit may differ. Here a distinction can be made, in terms of size and proximity to the Iranian mainland, between the Greater Tunb and the Little Tunb islands.

The Greater Tunb island

As mentioned above, approximately 3.98 square miles in size, this Island lies 15 nautical miles off the Iranian coast and 40 nautical miles off the UAE coast. It has a permanent population of about 200. Iran could claim a full effect continental shelf boundary in this context. Such a claim would, as noted earlier, run counter to pre-existing state practice which prevents islands situated at a considerable distance from the mainland having full effect continental shelf. The case of the Scilly Isles, located on the correct side of the median line (but 21 nautical miles from the English mainland) in the *Anglo/French Arbitration*, may be cited as an example of denying full effect continental shelf limit for an island located at such a considerable distance from its mainland.²¹⁷ Professor Bowett, in

²¹⁵ See below at p.306.

²¹⁶ See Chapter Five.

²¹⁷ *Anglo/French Arbitration*, at paras. 243, 244, 248 and 251. See also above in Section Two for more details on how the Scilly Isles were treated.

regard to the effect of islands with such a location, wrote that, where an island is lying outside the territorial sea of a state, to which it belongs, the island should only have partial continental shelf effect.²¹⁸

Moreover, giving full effect continental shelf would result in additional projection to the Iranian continental shelf, brought about by cutting off an area which appertains to the UAE continental shelf and attributing it, thereby, to Iran. The overall result, as it appears in the map below,²¹⁹ would mean that the Iranian continental shelf in the Greater Tunb area would be twice as large as the UAE continental shelf.²²⁰ This would cause an inequitable result in the delimitation between the two states, a result which both customary law and treaty law are anxious to avoid.²²¹

Iran, however, could convincingly argue for a half effect continental shelf limit. The method of half effect, as we have seen,²²² is mid-way between two equidistance lines drawn between, in this case, Iran and the UAE. The first is a line drawn without reference to the Greater Tunb island, and the second is a line constructed using the Tunb island as a base point. The method of half effect is a line representing half way between these two lines. Such an outcome can be justified on the ground that the Island lies only 15 nautical miles off the Iranian coast, and pre-existing practice in the Gulf gave half effect for an island with a similar geographical location. The case of the Iranian island of Kharg, although it is the only case in the region, may be cited as an example of giving half effect to an island situated 17 nautical miles from its mainland.²²³

Interestingly enough, this half effect continental shelf would not have any impact on the median line between the two parties' respective continental shelves' limit. Some nice calculations are necessary for illustration. The distance

²¹⁸ Bowett, *op. cit.*, n.136, at p.177. See also Karl, who suggests that an island in such a location should have no effect beyond its territorial sea limit. Karl, *op. cit.*, n.127, at p.658.

²¹⁹ See below at p.306.

²²⁰ The Iranian continental shelf area would extend to 38.5 nautical miles in the Greater Tunb area, Correspondingly, the UAE continental shelf would be limited to 18.5 nautical miles in this area.

²²¹ See Chapter Three for a discussion on the need to reach an equitable delimitation.

²²² See above at pp.280-2.

²²³ See Chapter Five.

between the two mainlands is about 57 nautical miles. The median line between the mainlands, if Greater Tunb island did not lie where it does, would be a line every point of which would be situated at 28.5 nautical miles from Iran and the UAE respectively. The 28.5 nautical miles is the full effect continental shelf for each party's mainland. Now, turning to an interesting point, the distance between Greater Tunb and the UAE coastlines is 40 nautical miles. So, the median line between these two coastlines is a line every point of which is situated at 20 nautical miles from Greater Tunb and the UAE respectively. Again, the 20 nautical miles is the full effect continental shelf for Greater Tunb and the UAE coastlines. Giving the island half effect would mean that the island would have 10 nautical miles' continental shelf. This is less than the 12 nautical miles' territorial sea limit. Accordingly, this half effect would not result in giving the Island any effect beyond its territorial sea limit.

The Little Tunb island

As noted earlier, this Island is small, barren, uninhabited and waterless. It lies 20 nautical miles off the Iranian coast. With this geographical nature it might be considered to be a rock within the meaning of Article 121(3), and thus it would have no continental shelf effect. However, this denial depends on whether the Article is a part of customary law.²²⁴ If the Article does not represent present-day, customary international law,²²⁵ and there was agreement to give the island a continental shelf effect, this could not be a full effect for the same reasons suggested in the case of the Greater Tunb island. In respect to a half effect continental shelf limit this, in practice, would give Little Tunb island only 11 nautical miles continental shelf limit. This limit, as in the case of Greater Tunb, would be entirely within its 12 nautical miles territorial sea, and therefore would have no effect upon the UAE-Iran median line.²²⁶

²²⁴ See above at p.270, and see also Chapter One/ Section Five for more discussion.

²²⁵ Thus it is not applicable since the 1982 Convention is not in force between Iran and the UAE.

²²⁶ In other words, it would give no further effect for the Island beyond its 12 nautical miles territorial sea limit.

The knock-on effects of the Islands

These are the legal entitlements of the three Islands. The governments of the two countries must be regarded as being aware of these entitlements, and the disadvantageous effect on their maritime boundaries, if either had to give up its claim of sovereignty over the Islands. Such an effect, as is illustrated in the map reproduced below, on the loser's interests and maritime boundary limit may be centred, *inter alia*, on the following aspects.

(a) In respect of Abu Musa island

In effect, if Iran obtained the ownership of Abu Musa island, this would project the Iranian continental shelf 15 nautical miles beyond the median line. There would be less projection, however, were the converse to happen. This is due to the location of the Island in the UAE side of the median line. Thus there would be an 11 nautical mile adjustment in the median line towards the Iranian coastline. Such an adjustment in the median line in the Abu Musa island sector would result in putting the winner very close to the loser's mainland.²²⁷ This may be perceived as threatening the loser's vital interests, and preventing it from protecting interests which require protection.²²⁸ The Tribunal in the *Guinea/Guinea-Bissau Award*, in this regard, stated that:

In order for any delimitation to be made on an equitable and objective basis, it is necessary to ensure that, as far as possible, each State controls the maritime territories opposite its coasts and in their vicinity. [Therefore, it is unacceptable, according to the equitable principles, to have a delimitation where] either party...should see rights exercised opposite its coasts or in the immediate vicinity thereof, which could prevent the exercise of its own right to development or compromise its security.²²⁹

In addition to the foregoing, the party losing the Island would lose the right of exploration and exploitation of Mupark oil field, which is situated 9 nautical miles to the south-east of the Island coast.

²²⁷ For further details on security interest and its relevance to the delimitation process, see Chapter Three.

²²⁸ *Greenland v. Jan Mayen Case*, at para.81; *Libya v. Malta Case*, at para.51.

²²⁹ *Guinea/Guinea-Bissau Award*, at paras.92, 98 and 124.

(b) In respect of the two Tunbs areas

If Iran dropped its claim over the two Tunbs islands in favour of the UAE, the two islands would add to the UAE maritime boundary enclaves of about 19.5 and 22 nautical miles long and about 30 nautical miles wide, completely isolated from other UAE maritime zones.²³⁰ This would deprive Iran of any continental shelf rights in this area, and would also prevent Iran from supervizing navigation in the designated traffic zone.²³¹ On the other hand, it would give the UAE national sovereignty in an area just 7.5 nautical miles, in respect of the Greater Tunb area, and 10 nautical miles in respect of the Little Tunb area, from the Iranian coast. However, should the Iranian view prevail, there would be no significant extension in its maritime boundary limit beyond the median line.²³²

It seems fair to suggest that the Iranian government's fear of the possibility of reducing its territorial sea limit to less than 12 nautical miles, and as a result preventing it from monitoring the innocence of a vessel's passage in the traffic route just outside its territorial sea, should it give up control over the two Islands, is the main obstacle in solving the crisis.²³³ This is because the two Tunbs islands, according to one Iranian scholar, constitute the fifth stage in the Iranian strategic defence line.²³⁴ The Iranian Cabinet, therefore, would be likely to continue to reject any offer from the UAE to negotiate over the sovereignty of the two Islands; at the same time they would continue to claim their legitimate presence on the Islands, since this would be the only way that they could preserve

²³⁰ This were the two Tunbs to have no continental shelf effect beyond their 12 nautical miles territorial sea limit. But, if they were to have an effect, say for example a full effect, this would give the UAE an area of continental shelf about 42 nautical miles wide; see the map below for illustration.

²³¹ See above.

²³² This where the islands would only generate half effect continental shelf. But, if the islands gained full effect continental shelf limits, as we have seen, Iran would be given a continental shelf area twice as larger as it should have; see the map below for illustration.

²³³ It is worth mentioning here that Iran rejected any offer from the UAE to put the question of the Tunbs islands on the agenda of negotiation, and insisted on limiting the discussion on the Abu Musa island. In contrast, the UAE insisted on the examination of the issue of the three Islands as a whole. For further details on the negotiation between Iran and the UAE, see Section One of this chapter.

²³⁴ See Pirouz, *op. cit.*, n.46, at p.106.

their full effect territorial sea limit, and preserve their entitlement to exercise legislative and enforcement jurisdiction on the traffic routing area.

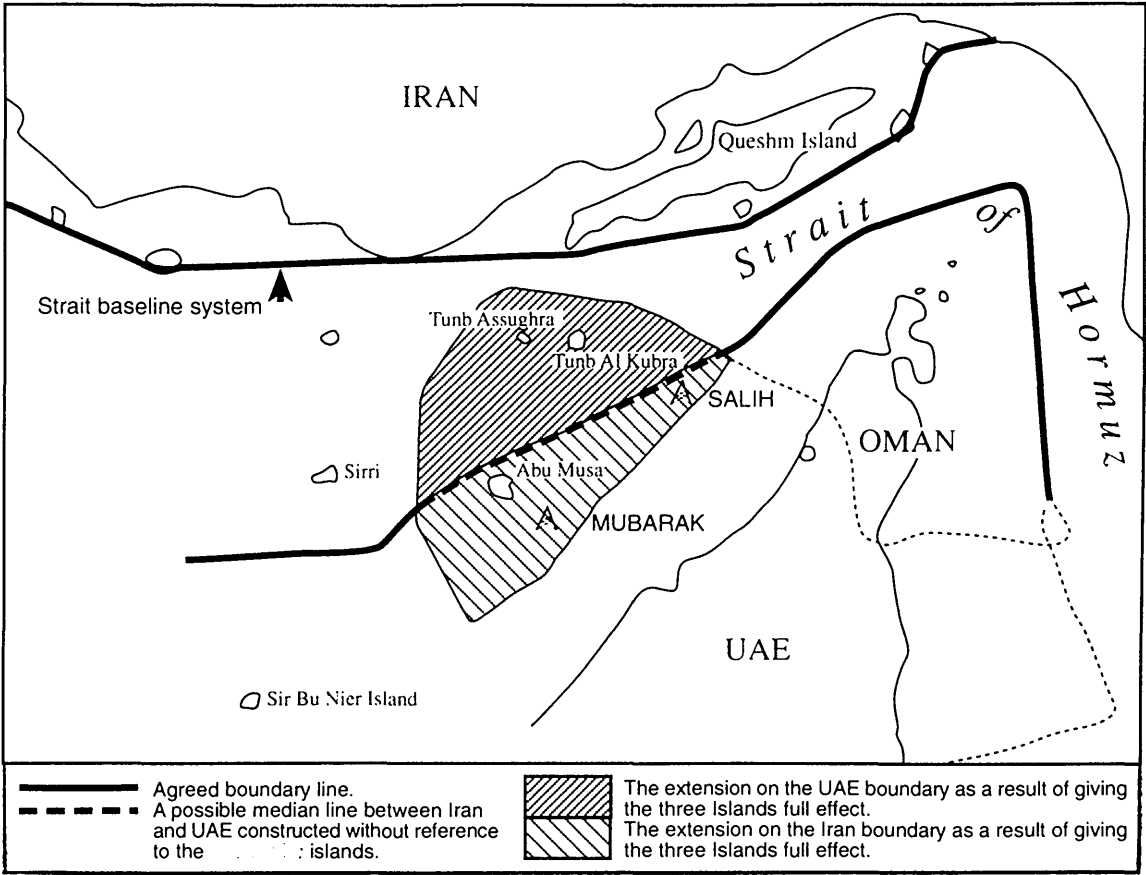


Figure: (31) The knock-on effect of the Islands on the UAE's and Iranian boundary.
Source: The Author.

Summary

It was mentioned at an earlier stage that there are three gaps in the UAE-Iran offshore boundaries which need to be addressed by the parties. These are the Gulf of Oman sector, the Abu-Dhabi sector, and the Islands sector. The first two were examined in Chapter Five. The boundary between the two countries in the Islands sector extends for a distance of about 66 nautical miles. The boundary line would originate from a possible UAE-Iran-Oman tri-junction point to point 5 in the UAE-Iran agreed boundary line of 1974. However, the dispute over the sovereignty of Abu Musa and the two Tunbs islands has prevented the construction of such a line. This dispute, moreover, would, *prima facie*, constitute a threat to the stability of the region.

In the introduction to this chapter we posed the question regarding the value of the dispute over sovereignty of these Islands. Is it justifiable for each state to sustain its claim whatever the consequence? Section Three of the present chapter was devoted to a discussion of the effects of these three Islands on the winner and on the loser maritime boundaries. The conclusion which emerged is that the knock-on effects of the Islands is an understandable matter of concern to the UAE as well as to Iran. Notwithstanding this, a settlement for the dispute must be reached in order to prevent an escalation of the dispute.

The government of the United Arab Emirates, in order to solve the dispute over sovereignty, has suggested submitting the issue to the International Court of Justice. The Iranian Cabinet, however, declined to accept this option.²³⁵ A possible explanation for the two parties' opposite positions is that those with a better claim were in a position to propose a judicial settlement, while those with a less certain claim declined to accept in order to protect themselves from the knock-on effect of losing the Islands.²³⁶

²³⁵ Statement by Mr. Rashid Abd Allah, the UAE Foreign Minister to the UN General Assembly, on 30 September 1992.

²³⁶ In an unpublished memorandum on the Iranian claims to Abu Musa and the Tunbs Islands, the British Government held the view that "the Iranians would win neither claim if they resorted to international adjudication even though the Tunbs (but not Abu Musa) are on the Iranian side of

As a result of the foregoing, it is unlikely that the two parties could reach an agreement to refer the matter of sovereignty to third-party settlement applying international law, before reaching an amicable settlement on the effect of the Islands and other related matters.²³⁷ This settlement, in order to be acceptable, should contain some kind of special treatment for certain fundamental issues in the area. In particular there should be:

1. An arrangement for the oil field, whether Abu Musa island goes to UAE or Iran.
2. A reconsideration of the full effect territorial sea limit for Abu Musa island, irrespective of the outcome of the sovereignty question. This would minimize its effect on each party's continental shelf limit.
3. A reconsideration of the full effect territorial sea limit for the two Tunbs islands, were they to become Emirates Islands. This would avoid an extensive cut-off effect from the Iranian continental shelf.

In the next chapter we shall identify the methods that the parties could use to reach an amicable solution on the issue of the effect of the three Islands on the respective maritime boundaries of the two States. Such a solution could, as is demonstrated below, also help to facilitate a settlement of the sovereignty issue.

the Gulf median line." The memorandum prepared by the Arabian Department, British Foreign and Commonwealth Office, 28 June 1970; at p.1.

²³⁷ The Court of Arbitration in the *Anglo/French Arbitration*, after it assumed that the median line between the Channel Islands and the French coastline was the boundary line, went on to acknowledge that the two parties were right when they decided that the delimitation of the boundary line in this area needed to be determined outside the law, by their direct negotiations; see para. 22 of the decision.

Recommendations

Recommendations



As we have seen, the delimitation between Iran and the United Arab Emirates in the Islands sector is complicated by rival claims to territorial sovereignty over Abu Musa and the two Tunbs islands. Several reasons, as noted in Chapter Six, have been suggested for the importance of these Islands, which justify the continued dispute over them. In general, their natural resources and strategic geographical position appear to be the primary features behind disputes over islands. In the Iran-UAE case, as illustrated earlier,¹ these two factors are clearly present in the location of these Islands in a semi-enclosed sea where “about two-thirds of seaborne trade in crude oil” is shipped from the area.² Natural resources are also available on the Islands or in their vicinity.

The aim of this chapter is to recommend certain methods of dispute settlement that may help Iran and UAE end their long-standing dispute over the Islands’ sovereignty, or at least narrow the gulf between their opposing views. At the moment, the two sides’ efforts to settle their differences do not go beyond the level of negotiation,³ which formally began in 1992. Negotiation, however, has proved unsuccessful. Indeed, one of the two parties, namely the UAE, proposed adjudication as an alternative. Iran, as noted, rejected this proposal. An explanation for this negative reaction was given in Chapter Six.⁴ It will be recalled that the fear of the knock-on effects of the three disputed Islands on the Iranian offshore boundary—where its claim of sovereignty over these Islands might fail to be accepted—prevented it from responding to the UAE’s call to

¹ See Chapter Six.

² *The Times Atlas and Encyclopedia of the Sea* (1989), at p.154.

³ In addition, there have been unverified reports of unsuccessful attempts at mediation from some states, e.g. Oman, Syria and Morocco. For further discussion on mediation, see below.

⁴ See above, at pp.307-8.

submit the sovereignty issue to the World Court. The Iranian fear, as noted, is centred, *inter alia*, on the possibility of reducing its territorial sea area to less than 12 nautical miles limit in the two Tunbs sector, and on losing the right of exploitation of the offshore oil field in the Abu Musa territorial sea area. It may be argued that Iran can hardly be expected to risk a decision of law on a question of this kind. Moreover, the existing *status quo* on the Islands satisfies the Iranian interests in the area. Iran, it will be recalled, has been occupying the two Tunbs islands and has a military presence on part of Abu Musa island.⁵ If this is the case, then the question to be asked is why Iran should be expected to accept the UAE invitation to refer the issue of the Islands' sovereignty to international adjudication, the outcome of which "may be difficult to predict."⁶

A possible solution to accommodating these Iranian concerns would be to reverse the process of solving the dispute by reaching an amicable settlement on the effect of these Islands, with the mutual interests of the parties being taken into account, before examining the sovereignty issue. There are three forms of dispute settlement, which have not been utilized and which are worthy of consideration by the parties in this context. These are: (1) mediation; (2) conciliation; and (3) *ex aequo et bono* adjudication. In this chapter we shall explain these three procedures inasmuch as they are relevant to the present work.

Mediation

As noted earlier, the UAE-Iran negotiations failed to bring the two sides into agreement over a settlement of the dispute between them. A practical measure for solving such a political stalemate could be through seeking or accepting the mediation of a third party, whether this be a foreign government, a disinterested individual,⁷ or an international organization. Mediation, it will be recalled, is a

⁵ For further discussion, see Chapter Six/Section One.

⁶ Bilder, B.R., "International Dispute Settlement and the Role of International Adjudication," *The International Court of Justice at a Crossroads*, Damrosch L.F. (ed.), Transnational Publishers Inc., New York (1987), at p.167.

⁷ For discussion on the advantages and disadvantages of a government mediation or an individual mediation, see Waldock, H., *International Disputes: the Legal Aspects*, Europa Publications, London (1972), at p.86.

form of dispute settlement through the participation⁸ of a third party in the negotiations between adversaries “in an attempt to induce them to change their stance.”⁹ Mediation is distinguishable from conciliation. The major differences between the two methods of settlement include the following:

- (1) A mediator usually represents a foreign government which has its own interest in ending the conflict between the adversaries.¹⁰ However, in the case of a conciliator, no interest exists except that of securing an acceptable settlement between the parties.
- (2) A conciliation commission can not be set up without a pre-existing agreement by the parties on the task of the commission, its membership and the procedure before it. In the case of mediation, a third party could offer its willingness to act, though the consent of the parties¹¹ and their co-operation is vital for success.
- (3) A “mediator usually makes his proposals informally and on the basis of information supplied by the parties, rather than through independent investigations which are a feature of conciliation.”¹²

The participation of a mediator in the negotiations between the parties can take various forms. He can bring the two parties together in a triangular relationship. The aim is to relax the tension between the adversaries, in order to improve the negotiation atmosphere,¹³ “to maintain the parties’ commitment to

⁸ A distinction is sometimes drawn between mediation and good offices. It is suggested that the latter means “the action taken to bring about or initiate negotiations, but without active participation in the discussion of the substance of the dispute.” See Waldock, *Ibid.*, at p.83; Merrills, J.G., *International Dispute Settlement*, 2nd ed, Grotius Publications Ltd, Cambridge (1993), at p.27; Glahn, G.V., *Law Among Nations*, 4th ed, Collier Macmillan Publishers, London (1981), at pp.517-8; *Oppenheim’s International Law*, 7th vol. II, Disputes, War and Neutrality, ed, Lauterpacht H. (ed.), London (1952), at p.10; Northedge and Donelan, *International Disputes: the Political Aspects*, Europa Publications, London (1971), at p.297.

⁹ Touval S. and Zartman W. (eds.), *International Mediation in Theory and Practice*, Westview Press, USA (1985), at p.7.

¹⁰ For further discussion on the possible interest of a foreign state in solving the dispute between the two states, see *Ibid.*, at pp.8-9 and pp.252-3.

¹¹ For further discussion on the reasons behind parties in conflict to seek or accept mediation, see *Ibid.*, at pp.9-10.

¹² Merrills, J.G., “The Principle of Peaceful Settlement of Disputes,” *The United Nations and the Principles of International Law, Essays in Memory of Michael Akehurst*, Lowe V. and Warbrick C. (eds.), Routledge, London (1994), at p.50.

¹³ Waldock, *op. cit.*, n.7, at p.85.

agreement,” and to avoid the stalemate and recrimination that sometimes occur in the negotiations.¹⁴ The Algerian role in the Iran-Iraq negotiations over the 1975 peace treaty may serve as an example of a mediator present in the negotiations between the disputant parties.¹⁵

Another role for a mediator is to serve as a channel of communication where the formal relationship between the parties has broken down. The diplomatic hostage crisis in 1979 between the United States and Iran may be cited as an example in which the mediation of the Algerian government helped to re-establish some form of communication between the Carter administration and the revolutionary authorities in Tehran.¹⁶ The role of a mediator, in addition, may extend to introducing a new idea into the discussions and to proposing a settlement to the parties. This may take the form of securing a cease-fire where war has already broken out,¹⁷ making a temporary arrangement to cool down the issue,¹⁸ signing a special agreement to refer the conflict to other forms of third-party settlement¹⁹ or, finally, concluding an agreement to end the dispute permanently.²⁰ Depending on the circumstances of each case, achieving one of these conclusions would be a successful outcome for the mediation mission.

Notwithstanding the flexibility and usefulness of the role of the mediator, states which are parties to a dispute may reject any offer of mediation simply because they are thinking about alternative means to defeat each other's claim. Moreover, were states to accept the offer of a third party to mediate between

¹⁴ Merrills, *op. cit.*, n.8, at p.40.

¹⁵ Ibid. For further discussion on the mediation between Iran and Iraq, see Touval and Zartman, *op. cit.*, n.9, at pp.67-86.

¹⁶ Merrills, *op. cit.*, n.8, at p.35.

¹⁷ The India-Pakistan war over the disputed territory of Kashmir in 1965 and the intervention of Soviet mediators to stop the hostility between them is an example of the role of mediation where war has begun. For more discussion on this mediation, see Touval and Zartman, *op. cit.*, n.9, at pp.141-71.

¹⁸ Iran-Sharjah dispute over the sovereignty of Abu Musa island and the British role in 1971 in securing a Memorandum of Understanding over the dispute. For more discussion on the relevant parts of this Memorandum, see Chapter Six/Section One.

¹⁹ In the Rann of Kutch dispute between India and Pakistan the British mediation succeeded in getting the parties to sign an agreement to refer their difference over the disputed territory to international adjudication before an *ad hoc* tribunal. The award of the arbitration is reproduced in 50 *ILR*.

²⁰ The hostage crisis. For more discussion on this crisis, see Touval and Zartman, *op. cit.*, n.9, at pp.21-65.

them, it would not necessarily mean that the mediator would succeed in his task. He may fail, “if the positions of the parties are for political reasons so widely separated and so firmly maintained that the persuasions and proposals of the mediator cannot bring them on to common ground.”²¹ The Saudi Arabian mediation between Iraq and Kuwait in the period 28 July and 1 August 1990 may be cited as a regional example of the failure of a mediator to bring two parties to any form of understanding. The result, it will be recalled, was the invasion of Kuwait by Iraq.

As far as the dispute between Iran and the UAE is concerned, mediation could break the deadlock in the negotiations and help the parties find some form of final settlement or at least a face-saving arrangement. Mediation, it should be noted, is not an unusual method of settlement in the existing practice of the states concerned. Iran had the leading role in accepting the intervention of a third party in the negotiations with another state. The Algerian and Egyptian role in the signing of the peace treaty between Iran and Iraq, and the Algerian mediation in the hostage crisis between Tehran and Washington have already been referred to; they are also fully reflected in the literature of dispute settlement through mediation.²² So far as the Iran-UAE relationship is concerned, British intervention between them in 1971 to secure an arrangement is relevant to their present differences. As was seen in Chapter Six, the result of Britain’s special envoy, Sir William Luce, shuttling between Tehran, Sharjah and Ras al Khaimah was the conclusion of a provisional arrangement between Iran and Sharjah over Abu Musa island, and the failure to bring about any compromise between Iran and Ras al Khaimah.²³

The full reasons for the achievement of a solution to part of the problem and failure in respect of the other have never been released to the public.²⁴ What is of

²¹ Waldock, *op. cit.*, n.7, at p.92.

²² *Ibid.*, pp.83-92; Merrills, *op. cit.*, n.8, at pp.27-42; Touval and Zartman, *op. cit.*, n.9, at pp.21-88.

²³ *The Times* of London, 30 November (1971), at p.6. See also above, at pp.261-3.

²⁴ Ambassador Julian Waker—one of the important figures in the mediation with Sir William Luce between Iran and the Emirates in 1971—argument in the conference on the *Arabian Gulf Islands: the Root of the Problem and the Requirement for Settlement*, Centre d’Études Euro-Arabe, Paris (1994), at p.147.

importance to note here is that the provisional arrangement that Sir William Luce succeeded in achieving—as that of Mr. Kosgin, the Soviet mediator in the Kashmir dispute—was not the ideal outcome for a mediation mission. Although such a provisional solution is often better than nothing, it is a far from perfect one. As Professor Merrills explains, it is “like a temporary filling in a bad tooth [which] may mean even more trouble in the future if steps are not taken to get to the root of the problem.”²⁵ As mentioned in Chapter Six, the problem of Abu Musa did indeed come to the surface again. Since 1992 Iran and the UAE have entered into bilateral negotiations, but no progress has been reported. Negotiations have never gone beyond the stage of “talks about talks”. Iran insists on limiting the agenda of discussion on the question of “the misunderstanding over Abu Musa”, whereas the UAE government demands discussion on the sovereignty question—the root of the problem—and Iranian withdrawal from the two Tunbs islands. The negotiations are at a standstill. To break such a deadlock, the UAE could invite a superpower state having leverage with the government in Teheran to act as mediator.²⁶ China, it may be suggested, is in an ideal position to exercise this role, largely because of its close relationship with Iran,^{27 28} and also because of its weight in the international community.²⁹ Iran, undoubtedly, is anxious to maintain the sympathy of its powerful friend, whose political and economic support might be useful in the event of conflict, and thus might be expected to respond to any new idea that China may introduce to end the dispute between the two neighboring states.³⁰

²⁵ Merrills, *op. cit.*, n.8, at p.40.

²⁶ For further discussion on the source of leverage, see Touval and Zartman, *op. cit.*, n.9, at pp.255-66.

²⁷ China is one of the main countries supplying Iran with arms and defence equipment. See the Egyptian daily newspaper *Al-Hraam*, 29 March (1992); *Aalam Al-Kaleej*, monthly newspaper, London, Issue no.43, January (1997), at p.4.

²⁸ For a discussion on the advantage of inviting a mediator having a close relationship with the other party in the dispute, see Touval and Zartman, *op. cit.*, n.9, at pp.255-8; Merrills, *op. cit.*, n.8, at p.34.

²⁹ China is one of the five permanent nations in the UN Security Council.

³⁰ For further discussion on the importance of the mediator as a powerful state to secure a settlement for the dispute, see Merrills, *op. cit.*, n.8, at pp.31-4; Touval and Zartman, *op. cit.*, n.9, at pp.263-6.

Conciliation

Conciliation has been defined as “the process of settling a dispute by referring it to a commission of persons whose task it is to elucidate the facts and ... to make a report containing proposals for a settlement, but which does not have the binding character of an award or judgment.”³¹

Early in the present century conciliation was regarded as a procedure suitable for handling political or non-legal disputes. Lauterpacht, for example, wrote that:

As a rule conciliation is adopted as obligatory for disputes described as non-legal, or non-justiciable, or for disputes other than those which can be settled by the application of rules of law, or for disputes as to matters other than respective rights. In some treaties it is prescribed as the obligatory preliminary instrument of settlement in regard to all disputes, whereas in others, although obligatory in regard to the so-called non-legal disputes, it is optional in regard to controversies described as legal.³²

The distinction between legal or justiciable disputes and non-legal or non-justiciable disputes³³ has not been fully followed by some scholars. Their view, in short, has been that any dispute is suitable to be brought before a judge. However, where the difference involves a change in the existing rules of law between the parties in as much as it is inequitable, the judge can only give a decision if he is authorized to apply the *ex aequo et bono*³⁴ procedure,³⁵ or the two disputed parties set up a conciliation commission.³⁶ The difference between the two methods is considered below.

Conciliation procedures were recorded for the first time in 1920 when Sweden and Chile concluded an agreement containing in one clause a reference to conciliation as an optional procedure for solving conflicts between them.³⁷ In

³¹ Oppenheim's, *op. cit.*, n.8, at p.12.

³² Lauterpacht, H., *The Function of Law in the International Community*, Clarendon Press, Oxford (1933), at p.261.

³³ For further discussion on political disputes and legal disputes, see Lauterpacht *Ibid.*, at pp. 139-65; Judge Lachs' separate opinion in the Military and Paramilitary activities case, *Nicaragua v. USA Case*, at p.168; Gordon, E., “Legal Disputes Under Article 36(2) of the Statute,” *The International Court of Justice at a Crossroads*, Damrosch L.F. (ed.), Transnational Publishers Inc., New York (1987), at pp.207-14; Merrills, *op. cit.*, n.8, at pp.139-44.

³⁴ See below for further discussion on an *ex aequo et bono* procedure.

³⁵ For further discussion on the two lines of thinking, see Habicht, M., *The Power of the International Judge to Give A Decision Ex Aequo Et Bono*, Constable & Co Ltd, London (1935), at pp.79-81.

³⁶ *Ibid.*, at p.80; Merrills, *op. cit.*, n.8, at p.77.

³⁷ Merrills, *op. cit.*, n.8, at p.59.

1922 the Assembly of the League of Nations recommended that member states conclude “agreements providing for the submission of disputes to conciliation commissions.”³⁸ A few years afterwards conciliation was incorporated into the General Act for the Pacific Settlement of International Disputes of 1928.³⁹ Because it is not the purpose of this work to describe in detail the methods of international dispute settlement, it will not engage in a historical study of the development of conciliation or of its place in modern international law. Such a discussion can be found elsewhere.⁴⁰ Here it will suffice to indicate the flexibility that conciliation procedures can provide in solving law of the sea disputes. This flexibility, as will be seen below, stems from two factors: the wide range of relevant circumstances that are taken into account; and the wide range of recommendations that could come out of a conciliation commission.⁴¹

The usefulness of conciliation procedures on law of the sea issues can be no better illustrated than by reference to the provision of the system for dispute settlement in the 1982 Convention. In this system, it will be recalled, conciliation procedures “occupy a prominent place.”⁴² Optional and obligatory submissions to conciliation procedures were provided in Part XV of the Convention. In the case of optional submission, the system begins with a general reference to Article 33(1) of the United Nations Charter where peaceful means of settlement are listed.⁴³ In spite of this, Article 284, entitled “Conciliation”, calls on any party to a dispute to invite the other party to submit the dispute to a conciliation commission. If the invitation is accepted and the procedure is agreed upon, any party to a dispute may “institute the procedure by written notification addressed

³⁸ Ibid., at p.60.

³⁹ Ibid., at p.61.

⁴⁰ Ibid., at pp.59-79; *Oppenheim's, op. cit.*, n.8, at pp.12-20. In the course of our examination of the UAE practices in determining its maritime boundaries we have discussed the important elements of conciliation. This was necessary in order to determine the nature of the Gallet-Anderson commission and their work of recommending a settlement for the boundary and territorial disputes between Qatar and Abu-Dhabi (UAE) in 1962. See Chapter Four/Section One at pp.164-6.

⁴¹ Churchill, R.R., “Maritime Delimitation in the Jan Mayen Area,” 9 *Marine Policy* (1985), at p.25, p.31 and p.38; Shaw, M, *International Law*, 3rd ed, Cambridge University Press, Cambridge (1991), at p.637. See also Article 5 from Annex V of LOS.

⁴² Merrills, *op. cit.*, n.8, at p.164.

⁴³ Article 279 of the 1982 Convention.

to the other party or parties to the dispute.”⁴⁴ But, if the invitation is rejected, the conciliation procedure will be terminated, and the disputed parties have to seek a settlement by alternative means, including compulsory procedures entailing binding decisions under Section 2 of Part XV of LOS.

This contrasts with the case of mandatory submission to conciliation, which was provided as an attempt to fill the gap in the system for settlement where recourse to an obligatory judicial procedure was not possible.⁴⁵ Article 11(2) of Annex V imposed on any party which had been notified of proceedings of conciliation, the obligation to submit to such proceedings.⁴⁶ Failure to do so, according to Article 12 of Annex V, would not prevent the conciliation commission from proceeding in the dispute. A dispute concerning maritime boundary delimitation is one of the categories which states may exclude from obligatory submission to judicial settlement in Section 2 of Part XV of the Convention. Where such exclusion is declared by one party to a dispute, the dispute in this case can only be submitted to a compulsory conciliation commission according to Part 2 of Annex V.⁴⁷

Where states which are parties to LOS submit a dispute to a conciliation commission—either obligatory or voluntary—and then fail to incorporate its report into an agreement, subparagraph 2 of Article 288(a) invites them to conclude an agreement to refer their conflict to judicial settlement in accordance with Section 2 of Part XV.⁴⁸ The rejection of the conciliation report means the failure of the commission.⁴⁹ This undesirable outcome requires the conclusion that there “is no occasion for self-congratulation because States have agreed to

⁴⁴ Articles 1 and 11 of Annex V.

⁴⁵ Merrills, *op. cit.*, n.8, at p.165; Adede, A. O., *The System for Settlement of Disputes under the United Nations Convention on the Law of the Sea*, Publications on Ocean Development, Martinus Nijhoff Publishers, the Netherlands (1987), at p.280. See also the remark of Merrills on the mandatory submission to conciliation; see Merrills, *op. cit.*, n.12, at p.54.

⁴⁶ Adede, *Ibid.*, at p.210 and p.255; Merrills, *op. cit.*, n.8, at p.165.

⁴⁷ Article 298 of the 1982 Convention.

⁴⁸ Subparagraph 3 excludes from this a sea boundary dispute which is finally settled from the application of subparagraph 2. This, however, may only reflect the nature of boundary agreements which enjoy some degree of stability and permanence. For further discussion, see Chapter Two/Section One.

⁴⁹ The unbinding element of the recommendation of a conciliation has been restated in Article 7(2) of Annex V.

meet before a body of conciliators authorized to propose recommendations which Governments are not bound to accept.”⁵⁰

But where the disputing states are not parties to LOS, like Iran and the UAE, they are still entitled to submit their difference to a conciliation commission on a consensual basis. The Iceland-Norway agreement to refer the maritime boundary delimitation dispute between them, in respect to Jan Mayen island, to a conciliation commission in 1981 may be cited as an example. The two parties asked the commission to take into account Iceland’s strong economic interests in the disputed area, together with the existing geographical and geological factors, and other special circumstances.⁵¹ The recommendation of the commission, which appears in the map reproduced below, was incorporated subsequently into an agreement between Norway and Iceland.⁵²

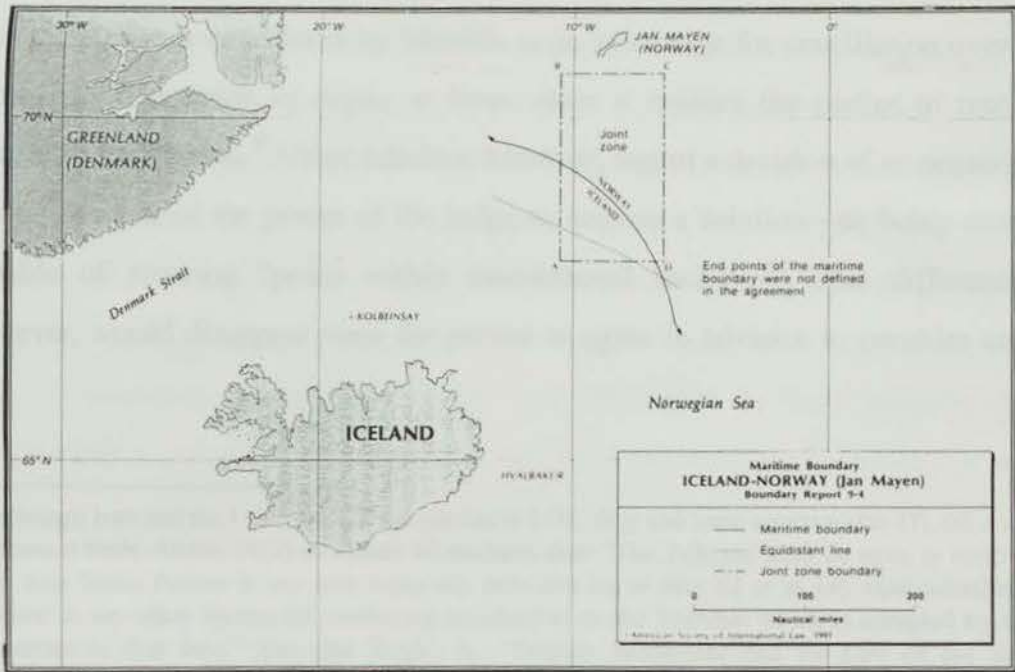


Figure: (32) Iceland-Jan Mayen boundary.
Source: *International Maritime Boundaries*, at 1761.

⁵⁰ Lauterpacht, *op. cit.*, n.32, at p.267. For the possibility of binding conciliation, see below.

⁵¹ The report of the Commission is reprinted in 21 *ILM* (1982), at p.1222. For comments on the report, see Brown, E.D., *Sea-Bed Energy and Minerals: The International Legal Regime*, vol. I, The Continental Shelf, Martinus Nijhoff Publishers, the Netherlands (1992), at pp.130-7.

⁵² Charney and Alexander (eds.), *International Maritime Boundaries*, Martinus Nijhoff Publishers, the Netherlands (1993), at pp.1762-5.

***Ex aequo et bono* adjudication**

An obvious alternative to referring the matter to conciliation is to refer it to *ex aequo et bono* adjudication before the ICJ, or an arbitral tribunal, or the new ITLOS.^{53 54} Before we go on to examine the important elements of the notion of an *ex aequo et bono* adjudication, it is of interest to draw some comparisons between the task of a conciliator and that of a judge applying an *ex aequo et bono* procedure. This is because both procedures are applied to reach “amiable compositeur;”⁵⁵ a settlement which does “not necessarily coincide with the rights and obligations obtaining between the parties.”⁵⁶

Perhaps the most important difference between the two methods is that a conciliation, as has been noted, normally proposes and recommends a settlement,⁵⁷ whereas a judge imposes a settlement on the states concerned.⁵⁸ This difference is considered by Merrills as an advantage for conciliation over a World Court decision *ex aequo et bono*, since it enables the parties to retain control of the dispute.⁵⁹ Other scholars, however, regard a decision of *ex aequo et bono*—because of the power of the judge to impose a solution—as being more capable of securing “peace within international society.”⁶⁰ This difference, however, would disappear were the parties to agree in advance to consider any

⁵³ Although Iran and the UAE are still not parties to LOS, they can have access to the ITLOS on a consensual basis. Article 20(2) of Annex VI declares that: “The Tribunal shall be open to entities other than States Parties in any case expressly provided for in Part XI or in any case submitted pursuant to any other agreement conferring jurisdiction on the Tribunal which is accepted by all the parties to that case.” See also Boyle, A., “Dispute Settlement and the Law of the Sea Convention: Problems of Fragmentation and Jurisdiction,” 46 *ICLQ* (1997), at p.53.

⁵⁴ For a comparison between ITLOS and ICJ, see Boyle, *Ibid.*, at pp.50-1.

⁵⁵ Habicht, *op. cit.*, n.35, at pp.69-70. See also Gilmore, W., “Legal and International aspects of the Organization of Eastern Caribbean States,” *Review of International Studies*, vol. 11, no. 4, October (1985), at p.323.

⁵⁶ Habicht, *op. cit.*, n.35, at p.70; Schwarzenberger and Brown, *A Manual of International Law*, 6th ed., Professional Books Limited, Abingdon (1976), at p.197.

⁵⁷ See Merrills, *op. cit.*, n.8, at p.59. However, the two parties, as far as conciliation is concerned, may agree to consider the status of its recommendation as binding upon them. See Merrills, *op. cit.*, n.8, at p.71.

⁵⁸ See Articles 59 and 60 of the Statute of the International Court of Justice.

⁵⁹ Merrills, *op. cit.*, n.8, at p.77.

⁶⁰ Lauterpacht, *op. cit.*, n.32, at p.267; Habicht, *op. cit.*, n.35, at p.81.

decision or recommendation of the conciliation commission in resolution of the dispute as final and binding on them.⁶¹

Another important difference between the two methods concerns the procedures used before them. Whereas the Statute of the ICJ articulates these procedures, in general there is no counterpart to these which the parties should follow before a conciliation commission.⁶² However, the two parties may set up their own procedures which they would agree to follow.

A further distinction is that a conciliation commission can be formed using individuals who need not possess legal training or skills, whereas a judge in the World Court⁶³—or in ITLOS⁶⁴—must have legal qualifications. An additional difference between the two methods is that the World Court—or ITLOS—is a readily available organ, whereas a conciliation commission in normal cases has to be set up.⁶⁵

Having highlighted the most important differences between the two methods, we shall now examine the *ex aequo et bono* procedure in more detail. An *ex aequo et bono* decision, a phrase derived from civil law, has been defined as “meaning, in justice and fairness; according to what is just and good; according to equity and conscience.”⁶⁶ In modern international law, resort to an *ex aequo et bono* process “is an extraordinary procedure and is destined to supplement the ordinary procedure applying the rights and obligations in force between the parties. The *ex aequo et bono* procedure has been provided by the Statute of the

⁶¹ Gilmore, *op. cit.*, n.55, at p.323.

⁶² For the parties to the 1982 Convention they may follow the procedure in Annex V.

⁶³ Article 2 of the ICJ Statute.

⁶⁴ Article 2(1) of Annex VI provides that “The Tribunal shall be composed of a body of 21 independent members, elected from among persons enjoying the highest reputation for fairness and integrity and of recognized competence in the field of the law of the sea.”

⁶⁵ In addition to these two differences there are others in respect to the establishment of each, the rules which govern the activity of each, and the nature of each. For more details, see Scheuner, U., “Decision *ex aequo et bono* by International Courts and Arbitral Tribunals,” *International Arbitration Liber Amicorum for Martin Domke*, Pieter Sanders (ed.), the Netherlands (1967), at pp. 282-3.

⁶⁶ See *Black's Law Dictionary*, 6th ed., West Publishing CO, USA (1994), at p.557. See also Degan, V. D., “Equitable Principles in Maritime Delimitations,” *International Law at the Time of its Codification*, Essay in Honour of Roberto Ago, vol. 2, Milano-Dott.A. Giuffrè Editore (1987), at p.127.

Permanent Court of International Justice⁶⁷...to permit a different settlement than that which the parties can obtain by having recourse to the ordinary procedure.”⁶⁸

The object of authorizing a judge to give an *ex aequo et bono* decision is, therefore, “to avoid inevitable consequences which would have resulted from the application of the rules of traditional law.”⁶⁹ For it, the parties charge the judge to create special rules for them in order to reach an equitable settlement or objective justice for their disputes.⁷⁰ This is specially true in the case where a dispute arises, as it frequently does in international relations, in which one of the parties finds the existing rules of law would not be in its favour or would result in a situation that would be inequitable from its point of view. Thus it seeks to alter these rules to have objective justice.⁷¹ Authorizing the court to apply an *ex aequo et bono* procedure does not, however, mean the court is entitled to “a complete freedom of action...[or can] act capriciously and arbitrarily.”⁷² Rather it would mean that the court, by authority of the parties, would be required “to make adjustment to an existing legal situation” in order to reach a fair decision.⁷³

To do so, a judge applying *ex aequo et bono* procedure will not start from a vacuum, he will begin the process by ascertaining the existing legal relation between the parties, and then he may adjust—or discard—this relation, in the

⁶⁷ Now Article 38(2) of the Statute of the International Court of Justice.

⁶⁸ Habicht, *op. cit.*, n.35, at p.67.

⁶⁹ *Ibid.*, at p.83.

⁷⁰ Schwarzenberger and Brown in this relation have explained that in *ex aequo et bono* adjudication “the parties grant the Court an *ad hoc* legislative power to seek an equitable and practical solution to their dispute, even though such a settlement may not be in conformity with the legal rights and duties of the parties.” See Schwarzenberger and Brown, *op. cit.*, n.56, at p.197. To the same effect, see Lauterpacht, E., *Aspects of the Administration of International Justice*, Lauterpacht Memorial Lectures, Research Centre for International Law, Grotius Publications Limited, Cambridge (1991), at p.147; Degan, *op. cit.*, n.66, at p.110; Habicht, *op. cit.*, n.35, at p.81.

⁷¹ Habicht, *op. cit.*, n.35, at p.79; Louis, B.S., “Arbitration of International Disputes *Ex aequo et bono*”, *International Arbitration Liber Amicorum for Martin Domke*, Pieter Sanders (ed.), Netherlands (1967), at p.333; Schwarzenberger and Brown, *op. cit.*, n.56, at p.257.

⁷² Louis, *Ibid.*, at p.331 See also Scheuner, *op. cit.*, n.65, at p.283; Rosenne, S., *The Law and Practice of the International Court*, vol.1, A.W.Sijthoff-Leyden, the Netherlands (1965) at p.326; Degan, *op. cit.*, n.66, at p.110; Schwarzenberger and Brown, *op. cit.*, n.56, at p.197; *Oppenheim's International Law*, 9th ed., vol. 1, Peace, Jennings and Watts (eds.), Longman, London (1996), at p.44.

⁷³ Scheuner, *op. cit.*, n.65, at p.283. See *Swiss-French Free Zones Case* (1930), *PCIJ Reports Series A-N° 24*, at p.10; Thirlway, H., “The Law and Procedures of the International Court of Justice 1960-1989,” Part Six, 65 *BYBIL* (1994), at p.16.

light of all the relevant circumstances, in as much as is necessary to reach an equitable settlement.⁷⁴ An *ex aequo et bono* decision in this meaning is different from applying equity within the existing rules of International law.⁷⁵ This latter form of equity is said to have: (1) a role of adapting or mitigating the law to apply it to “the facts of individual cases,”⁷⁶ in order to reach an equitable result; or (2) a role of a general principle of law that constitutes “a starting guide for seeking, *ex ante*, an equitable result based on the balance of all the relevant circumstances of each case.”⁷⁷

In the concept of maritime boundary delimitation, however, this delicate distinction between equity and *ex aequo et bono* could be argued to be inapplicable. A number of scholars, including a member of the World Court, consider the resort of the court to equity and equitable principles to be no more than an application of *ex aequo et bono* adjudication, but without admitting so.⁷⁸ For example, Sir Robert Jennings wrote that: “what the litigants get is in effect a decision *ex aequo et bono* whether they wanted it or not.”⁷⁹

⁷⁴ Lauterpacht, *op. cit.*, n.32, at p.315; Merrills, *op. cit.*, n.8, at p.95; Habicht, *op. cit.*, n.35, at p.69 and p.81; Louis, *op. cit.*, n.71, at p.331; Degan, *op. cit.*, n.66, at p.110.

⁷⁵ Lauterpacht, *op. cit.*, n.32, at p.314; Habicht, *op. cit.*, n.35, at p.68; O'Connell, D.P., *International Law*, vol. I, Stevens and Sons, London (1965), at p.14; Brownlie, I., *Principles of Public International Law*, 4th ed, Clarendon Press, Oxford (1990), at p.27; Scheuner, *op. cit.*, n.65, at p.282. See also above at pp.107-10.

⁷⁶ Akehurst, M., “Equity and General Principles of Law,” 25 *ICLQ* (1976), at p.801. See also Lowe, V., “The Role of Equity in International Law,” 12 *The Australian Year Book of International Law* (1992), at p.56; Lauterpacht, *op. cit.*, n.32, at p.314; Lauterpacht, *op. cit.*, n.70, at p.119; Frank, T., *Fairness in International Law and Institutions*, Clarendon Press, Oxford (1995), at p.57; Miyoshi, M., *Consideration of Equity in the Settlement of Territorial and Boundary Disputes*, Martinus Nijhoff Publishers, the Netherlands (1993), at p.12.

⁷⁷ Jiménez de Aréchaga, “The Conception of Equity in Maritime Delimitation,” *International Law at the Time of its Codification*, Essay in Honour of Roberto Ago, vol. 2, Milano-Dott.A. Giuffrè Editore (1987), at p.238.

⁷⁸ See, for example, Sir Gerald Fitzmaurice's observation on Elihu Lauterpacht's paper: “Equity, Evasion, Equivocation and Evolution in International Law” reproduced in Lauterpacht, *op. cit.*, n.70, at p.125. A similar view was expressed by Judge Gros in his dissenting opinion in the *Gulf of Maine Case*, at p.382, para.37 and p.389, para.48; Judge Oda in his separate opinion in the *Greenland v. Jan Mayen Case*, at pp.113-4, paras.85-8; Weil, P., *The Law of Maritime Delimitation-Reflection*, Grotius Publications Limited, Cambridge (1989), at p.167; Degan, *op. cit.*, n.66, at p.126.

⁷⁹ Jennings, R.Y., “The Principles Governing Marine Boundaries,” *Staat und Völkerrechtsordnung, Festschrift für Karl Doehring* (1989), at p.401; cf. Judge Shahabuddeen in his separate opinion in the *Greenland v. Jan Mayen Case*, at p.194.

In our view this is not an acceptable position. The distinction between equity within the law and an *ex aequo et bono* decision is not a matter of whether the law is relevant or not. Rather is it a question of what relevant circumstances and factors can be taken into account in each process. In an *ex aequo et bono* procedure the range of factors is much wider, to the extent—as will be seen—of including matters that have no direct relevance to the two parties’ receptive legal rights. This, however, does not mean a judge applying this procedure would necessarily or systematically leave aside *in toto* the existing rights and duties between the parties; he may do so, but he may also use the existing legal relationship as a basis for laying down a new and more appropriate relationship that satisfies the equitable requirement between the two parties.⁸⁰

A decision *ex aequo et bono* would permit the judge to give consideration to various factors, which would not be the case were he to apply a rule of law.⁸¹ Such a power arouses some concern over the adequacy of the court’s necessarily technical knowledge to perform such a task. Headlam-Morley, for example, expressed his doubts about courts or tribunals—whose normal function is to determine a dispute over a point of law—and their ability to devise “a scheme for future administration, for such a scheme will probably require technical knowledge and administrative experience which a judicial authority does not possess.”⁸² In similar vein, Sir Robert Jennings suggested that a “decision *ex aequo et bono* could well be made without the need of specifically legal training or skill; indeed may perhaps be made *better by one with a different skill*.”⁸³

However, such doubts about a court or tribunal’s capability should not be exaggerated, since they can where necessary call in the assistance of experts, as does a judge in the domestic system.⁸⁴ Article 27 of the Statute of the

⁸⁰ Merrills, *op. cit.*, n.8, at p.95; Habicht, *op. cit.*, n.35, at p.81; Louis, *op. cit.*, n.71, at p.331; Degan, *op. cit.*, n.66, at p.110.

⁸¹ Lauterpacht, *op. cit.*, n.32, at p.319.

⁸² *Ibid.*, at p.321.

⁸³ Italics added. See Jennings, R. Y., “Equity and Equitable Principles,” 42 *Ann Suisse De Droit International* (1986), at p.30.

⁸⁴ Lauterpacht, *op. cit.*, n.32, at pp.322-4; Waldock, *op. cit.*, n.7, at pp.136-7. Another argument was advanced to answer the question of the court’s capability. The argument was that “the expert and technical knowledge required for the creation of new rights and obligations is not necessarily

International Court of Justice provides “for technical assessors to assist the special chambers of the Court in labor and communication and transit cases.”⁸⁵ In the system for settlement of disputes in the 1982 Law of the Sea Convention, Article 289 allows the court or tribunal—exercising jurisdiction under this system—at the request of a party to the dispute or *proprio motu*, to appoint technical experts to assist it in determining the issues.⁸⁶ The *Corfu Channel Case* between the UK and Albania in 1949 is “the outstanding example of the use of experts by the ICJ.”⁸⁷ In this case one of the questions, which the Court was asked to determine was the Albanian Government’s responsibility for the explosion in 1946 from mines in its territorial sea, and for the damage and loss of human life which resulted to two British vessels. In determining this responsibility it was necessary, *inter alia*, to prove that the Albanian Government knew of the minelaying operation in its territorial sea. In helping to do so, the Court used experts to ascertain “the time the minelayers would have been in the waters.”⁸⁸

The flexibility of conciliation commissions and ex aequo et bono procedures in solving maritime boundary disputes.

The flexibility of conciliation and *ex aequo et bono* procedures can best be illustrated by reference to two features:

(1) The scope of factors

The range of relevant circumstances that a conciliator or a judge applying an *ex aequo et bono* procedure may take into account is much wider, covering factors that have hitherto been regarded as irrelevant to maritime boundary

greater than that necessary for the application and determination of existing rights.” See Lauterpacht, *op. cit.*, n.32, at p.321.

⁸⁵ *Ibid.*, at p.324.

⁸⁶ The list of experts is prepared in accordance with Annex VIII, Article 2. In addition, a special arbitral tribunal is provided in this system where the parties wish to refer a dispute which involves scientific factors. See Annex VIII for the provision of submitting a dispute to a special arbitral tribunal.

⁸⁷ White, G., “The Use of Experts by the International Court,” *Fifty Years of the International Court of Justice*, Essays in Honour of Sir R. Jennings, Lowe and Fitzmaurice (eds.), Cambridge University Press, Cambridge (1996) at p.529.

⁸⁸ *Corfu Channel Case*, at p.20.

delimitation.⁸⁹ In Chapter Three we discussed some of these, such as economic and socio-economic factors, arrangements for navigation aids, pollution control, security and other administration arrangements, and how they have been prevented from influencing the course of a boundary line in the context of international adjudication. Moreover, the agreement on a conciliation commission or for an *ex aequo et bono* adjudication may contain a valuable source of guidance to a conciliator or a judge in performing his task.⁹⁰ For example, in the case of Iran and the UAE, the two sides could submit the issue of the knock-on effects of the three Islands to a conciliation commission or an *ex aequo et bono* adjudication to find an effect for the three disputed Islands that would have a minimum impact on their common maritime boundary. Were they to agree on that, they could ask the commission or the court to determine the course of the boundary between them in the disputed area taking into account specified elements. These could include the following:

- (1) The disputed status of the Islands;
- (2) The welfare of the inhabitants of Abu Musa and Greater Tunbs;⁹¹
- (3) The political interest of the two parties and the interests of peace and security in the Arabian Gulf;
- (4) Convenience and necessity;
- (5) The disproportionately distorting effects of the three islands for the course of the continental shelf boundary line between the two parties, which would otherwise be indicated by the general configuration of their coasts;
- (6) The presence of Abu Musa island on the UAE side of the median line, and the location of the two Tunbs on the Iranian side of the median line;
- (7) The location of Mupark oil field 9 nautical miles off Abu Musa island toward the UAE coastline; and

⁸⁹ Lauterpacht, *op. cit.*, n.32, at p.319; Churchill, *op. cit.*, n.41, at p.31. It is interesting to note that in the *Jan Mayen Island Conciliation* commission of 1981 the two parties asked the commission to take into account Iceland's strong economic interest in the disputed area, together with the existing geographical and geological factors and other special circumstances. The report of the Commission is reprinted in 21 *ILM* (1982), at p.1222.

⁹⁰ Munkman, A.L.M., "Adjudication and Adjustment—International Judicial Decision and the Settlement of Territorial and Boundary Disputes," 46 *BYBIL* (1972-3), at p.21.

⁹¹ Little Tunb is an uninhabited island, See Chapter Six/Section One for further discussion.

(8) The flexibility of the two parties in their pre-existing practice in dealing with questions of maritime boundary delimitation.

(2) The context of settlement

The range of settlement outcomes that may be advised by a conciliator or decided by a judge applying an *ex aequo et bono* procedure is also wider than would be the case in “normal” adjudication. For example, it may include a co-operative arrangement over natural resources.⁹² An agreement between the parties involved is required to create a joint development zone.⁹³ The possibility that a conciliation commission may recommend a joint development zone is to be understood from the nature of conciliation as a procedure that recommends, unless the parties otherwise agree,⁹⁴ a settlement. These recommendations need to be incorporated into an agreement between the parties involved to take effect. Such an agreement would be the instrument that creates the co-operative arrangements, and not the recommendations of the conciliation commission. The possibility of a conciliation commission proposing a joint development zone is demonstrated in practice by the act of the Jan Mayen conciliation commission of 1981. In this, there was a unanimous recommendation for Norway and Iceland to establish such a zone between them.

In an *ex aequo et bono* procedure the situation is complicated by the fact that a judge is imposing, and not proposing, a settlement for the dispute. For this reason, it appears to be difficult for a court to decide on a system of a joint sovereignty zone. For such a zone to be created *de novo*, the Chamber in the *Gulf of Fonseca* case held, required an agreement between the parties concerned.⁹⁵ Notwithstanding this fact, there seem to be two situations where it would be possible for the court to impose or recognize the concept of joint sovereignty,

⁹² This can be no better illustrated than in the provision of Article 5 from Annex V of UNCLOS. The Article, it will be recalled, asks the conciliation commission to “draw the attention of the parties to any measures which might facilitate an amicable settlement of the dispute.” One of these measures can be the contracting of a joint sovereignty zone between them.

⁹³ See below.

⁹⁴ For a discussion on the possibility of binding conciliation, see above, at p.319.

⁹⁵ *Gulf of Fonseca Case*, at para.399.

whether applying paragraphs 1 or 2 of Article 38 of the ICJ Statute. The first situation which may arise under Article 38(1) is where there is an existing area of joint sovereignty between the parties involved. This pre-existing co-operative zone could have emerged on historical grounds as in the *Gulf of Fonseca Case*,⁹⁶ or have been established from a co-operative arrangement between them.⁹⁷ In the latter instance the court must have been asked to maintain the *status quo* respect of such zone. As far as Iran and the UAE are concerned, the two sides, it will be recalled, agreed in the 1971 Memorandum of Understanding on a form of co-operative arrangement over the oil field in the Abu Musa territorial sea.⁹⁸ The World Court would not be expected to disregard such an arrangement. Rather it could be expected to preserve it, if it had been asked to do so.⁹⁹

The second situation in which it is possible to have a joint sovereignty outcome is where the parties to a dispute ask the court to give a judicial suggestion¹⁰⁰ and to identify the factors that they may take into account in determining the boundary between them *ex aequo et bono*. In this case the court, as it did in the *North Sea Case*¹⁰¹ and in the *Tunisia v. Libya Case*,¹⁰² would identify a number of factors¹⁰³ that may help the parties to draw the line between them, but it would not draw a boundary line itself.¹⁰⁴ In the light of the court's judgment the parties would then work out an agreement to draw the boundary line and, if necessary, construct a joint sovereignty zone between them.

⁹⁶ *Gulf of Fonseca Case*, at paras.401, 404-5.

⁹⁷ See Judge Basdevant's separate opinion in the *Minquiers Case (1953)*, at pp.83-4. See also the remark of Sir Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice*, Cambridge University Press, Cambridge (1995), at p.562.

⁹⁸ See above, at pp.254-5.

⁹⁹ Judge Basdevant's separate opinion in the *Minquiers Case (1953)*, at pp.83-4.

¹⁰⁰ For a discussion on judicial recommendation, see Fitzmaurice, *op. cit.*, n.97, at pp.559-63; see also the World Court judgment in *Morocco Case (1952)*, at pp.211-2.

¹⁰¹ Article 1 of the special agreement to submit the two cases to the Court. 41 *ILR*, at p.333.

¹⁰² *ICJ Reports 1982*, at p.23, see also para.23 of the Judgment.

¹⁰³ It is possible that, as in the delimitation agreements in the North Sea region following the World Court judgment in the 1969 case, the parties will not use all these factors. See Malloy, M., P., "An Analysis of the Jurisprudence of the International Court of Justice Cases concerning Boundaries," in 14 *National and International Boundaries, Thesaurus Acroasium* (Session 1983), Institute of Public International Law and International Relations, Thessaloniki (1985), at p.333.

¹⁰⁴ It may draw an illustrative one.

The interesting question is, however, that if the parties in the compromise agreement did not ask the court to give recommendations or to preserve what had been established between them, would it be possible for a court applying an *ex aequo et bono* procedure to designate a joint sovereignty zone between them or not? There is some difficulty in answering this question for two reasons. First, the nature of the court's function to determine rights and obligations.¹⁰⁵ Second, the fact that the court has not been charged with the power to apply an *ex aequo et bono* jurisdiction to date (nor has it the opportunity to clarify clearly the exact limits of its judicial function in this context.)¹⁰⁶

Designating a joint sovereignty zone is certainly different from the allocation of rights and duties. Creation of such a new regime—which is usually done through an agreement between the legislative bodies of the parties involved—¹⁰⁷ through this procedure is denied by some judges and scholars. Judge Kellogg, for example, in observations appended to the Order in the *Swiss-French Free Zones Case* of 1930, held to the view that the court had no power under its Statute to create new rights and obligations,¹⁰⁸ nor had it the power “to pass upon questions essentially economic and political in their nature.”¹⁰⁹ Mr. Ulrich Scheuner, in his article *Decision ex aequo et bono*, expressed sympathy with Judge Kellogg's observations¹¹⁰ and suggested that:

There are limits to the function of a court or tribunal beyond which it ceases to function as a court proper and becomes an instrument of conciliation or of political advice. There are tasks which only a legislative organ or a political commission can tackle, e.g., the drafting of a complicated new regulation for a situation of international law, and which are alien to a court.¹¹¹

In supporting his opinion, Mr. Scheuner cited the judgment of the World Court in the *South West Africa Case* where the Court declined to engage in an

¹⁰⁵ Lauterpacht, *op. cit.*, n.76, at p.139; Habicht, *op. cit.*, n.35, at p.84.

¹⁰⁶ Lauterpacht, H., *The Development of International Law by the Permanent Court of International Justice*, Longman, Green and Co., London (1934), at p.66; Gordon, *op. cit.*, n.33, at p.185.

¹⁰⁷ *Gulf of Fonseca Case*, at para.399.

¹⁰⁸ Judge Kellogg's observations in the *Swiss-French Free Zones Case*, PCIJ Reports Series A-Nº 24, at p.33.

¹⁰⁹ *Ibid.*, at p.32, see also pp.34-43.

¹¹⁰ Scheuner, *op. cit.*, n.65, at p.283.

¹¹¹ *Ibid.*, at p.284.

essentially legislative task. The Court justified its decision on the basis that such a task lies outside the function of a *court of law*.¹¹² But a court applying an *ex aequo et bono* procedure is not strictly a court of law, whose function is one of determining rights and obligations.¹¹³ An *ex aequo et bono* procedure goes beyond that. It gives the court the power of arriving at “a new and more appropriate legal relationship,”¹¹⁴ even if this is “inconsistent with the essentially judicial function of the Court.”¹¹⁵ In reaching such a settlement the court has the power “to depart from the law,”¹¹⁶ to change the law, to accept a claim not recognized by the law or to reject a claim based on the law.”¹¹⁷ That is why “a clear and explicit provision to that effect” is required from the parties.¹¹⁸

As a result of the foregoing, it seems fair to suggest that, while some doubt exists, a court applying an *ex aequo et bono* procedure is entitled to create a joint sovereignty zone between the parties, if such a regime would fulfil the requirement of justice and fairness. The power to establish such a new regime, Sir Hersch Lauterpacht has stated, is “already contained *in nuce* in the very agreement conferring upon the Court jurisdiction *ex aequo et bono*. The Court gives flesh and bones to this agreement. The [new regime] which it lays down is not of its own creation, although it is of its own formulation. It is the creation of the parties.”¹¹⁹

As far as the boundary question between Iran and the UAE is concerned, the two parties could submit the whole dispute—including the question of sovereignty—to the International Court of Justice or ITLOS, and require the

¹¹² Italics added. *South West Africa Case (1966)*, at p.36, para. 57.

¹¹³ See the comment of Dr. Max Habicht on the court judicial function. Habicht, *op. cit.*, n.35, at pp.53-4.

¹¹⁴ Ibid., at p.53. See also Lauterpacht, H., *The Development of International Law by the International Court of Justice*, Stevens & Sons Limited, London (1958), at p.213; Degan, *op. cit.*, n.66, at p.110.

¹¹⁵ *Oppenheim's*, *op. cit.*, n.72, at p.44.

¹¹⁶ This, however, does not mean it is necessary that the court depart from the rule of law. It will do so where the rule of law is not compatible with justice and fairness. See Ibid., p.44; Habicht, *op. cit.*, n.35, at p.69.

¹¹⁷ Louis, *op. cit.*, n.71, at p.333.

¹¹⁸ *Swiss-French Free Zones Case*, PCIJ Reports Series A-N° 24, at p.11.

¹¹⁹ Lauterpacht, *op. cit.*, n.32, at pp.318-9, see also p.317, and p.374. To the same effect, see Degan, *op. cit.*, n.66, at p.110.

Court to decide the sovereignty over the Islands in accordance with International law, but decide the case of maritime boundary delimitation *ex aequo et bono*. The Court in this instance would have two different bases of jurisdiction. First, it would be required to decide the question of sovereignty over the Islands in accordance with international law as indicated in Article 38(1) of the Statute of the International Court of Justice or Article 293(1) of LOS in the case of ITLOS. Secondly, on the basis of its decision on the sovereignty question, it would be required to determine the maritime boundary between the two countries *ex aequo et bono* as provided in Article 38(2) of the ICJ Statute or Article 293(2) of LOS in the case of ITLOS.

An alternative would be for Iran and the UAE to conclude an agreement to submit the sovereignty dispute to the ICJ, applying the rules of law in the normal manner. In this agreement they could also provide that, in the light of the Court's judgment, the two contracting parties would enter into bilateral negotiations to reach an agreement which would embody objective justice on the effect of these three Islands on the maritime boundary delimitation between them. Where no agreement can be reached within a reasonable period of time, it could stipulate that any party may submit the delimitation question to an *ex aequo et bono* procedure, or to a binding conciliation.¹²⁰

Possible Equitable Effect

It was argued at an earlier stage of this study that the knock-on effect of Abu Musa and the two Tunbs islands is a matter of concern for Iran as well as for the UAE. Certain mechanisms to minimize this effect have been proposed in the present chapter. Here, we shall suggest a possible fair and equitable effect for these Islands in a maritime boundary delimitation between UAE and Iran. This possible effect is suggested and illustrated in a map reproduced below:

¹²⁰ For the difference between the two methods, see above.

(1) In respect of Abu Musa island

We have seen that the knock-on effect for losing sovereignty over the Island would centre on two issues: diminution of the limit of the loser's continental shelf; and, the loss of rights to the oil field. A possible equitable solution, in the light of the relevant circumstances of the area, would be to allocate maritime space to the Island in a manner such that the interests of the two parties are taken into account. This possible suggestion therefore is two-fold:

(a) In respect of the continental shelf

It has been submitted that giving a full effect territorial sea to the island of Abu Musa would not create fairness in the delimitation between Iran and the UAE.¹²¹ An appropriate and practical method of abating the disproportion and inequity, which would otherwise result from giving the Island a full effect territorial sea limit, might be achieved by giving the Island, for example, a half effect territorial sea limit. This half effect in practice would only result in a 5-nautical-mile adjustment in the median line, were the UAE to win the ownership of the Island.¹²² Were Iran to obtain sovereignty the half effect territorial sea limit would cause a 9 nautical mile adjustment in the median line towards the UAE coastline. This is because the Island in this case is located on the wrong side of the median line.¹²³

(b) In respect of the oil field

A major interest of each party is to preserve its rights in the oil field. This could be done by designating a joint development zone for the oil field, irrespective of the determination of sovereignty over the island. A joint development zone would preserve the unity of the field and would maintain the *status quo*, as a joint development zone, which was determined in the Iran-

¹²¹ See Chapter Six/Section Three.

¹²² The Iranian continental shelf limit as a result would be reduced to 31.751 nautical miles, instead of to 36.751. Correspondingly, the adjustment in the median line would cause an extension in the UAE continental shelf limit to 41.751 nautical miles instead of 36.751.

¹²³ This would add 3 nautical miles to the adjustment in the median line.

Sharjah 'Memorandum of Understanding'. A number of examples in state practice in creating a joint development zone were examined in Chapter Four.

(2) *In respect of the two Tunbs area*

As was mentioned, there would be a cut-off from the Iranian side of the median line were the UAE to have its claim to sovereignty of the two Tunbs acknowledged and they be given a 12-nautical-mile territorial sea limit. Equity and fairness, however, call for only a limited effect to be attributed to the two Islands in this particular geographical situation in order to reach an equitable result for the delimitation. A three-mile enclave around the two Islands would serve as an intermediate solution that would effect a more appropriate and a more equitable balance between the respective interests of the two parties. Furthermore, this solution would give the UAE the opportunity to observe the innocence of a vessel's passage in the designated traffic route towards the Gulf, since this traffic route is within the two Tunbs' three-nautical-mile territorial sea limit.¹²⁴ Moreover, this intermediate solution would preserve the Iranian mainland's 12-nautical-miles territorial sea limit.

It is believed that in this manner this long standing irritant to the relations between these two states in an economically important and politically sensitive area of the world could be resolved to the lasting benefit of both.

¹²⁴ Iran, by virtue of its position as a strait State on the Strait of Hormuz, would be in a position to monitor the innocence of a vessel's passage to and from the Gulf. Therefore, Iran, unlike the UAE, would be able to observe navigation in the two directions.

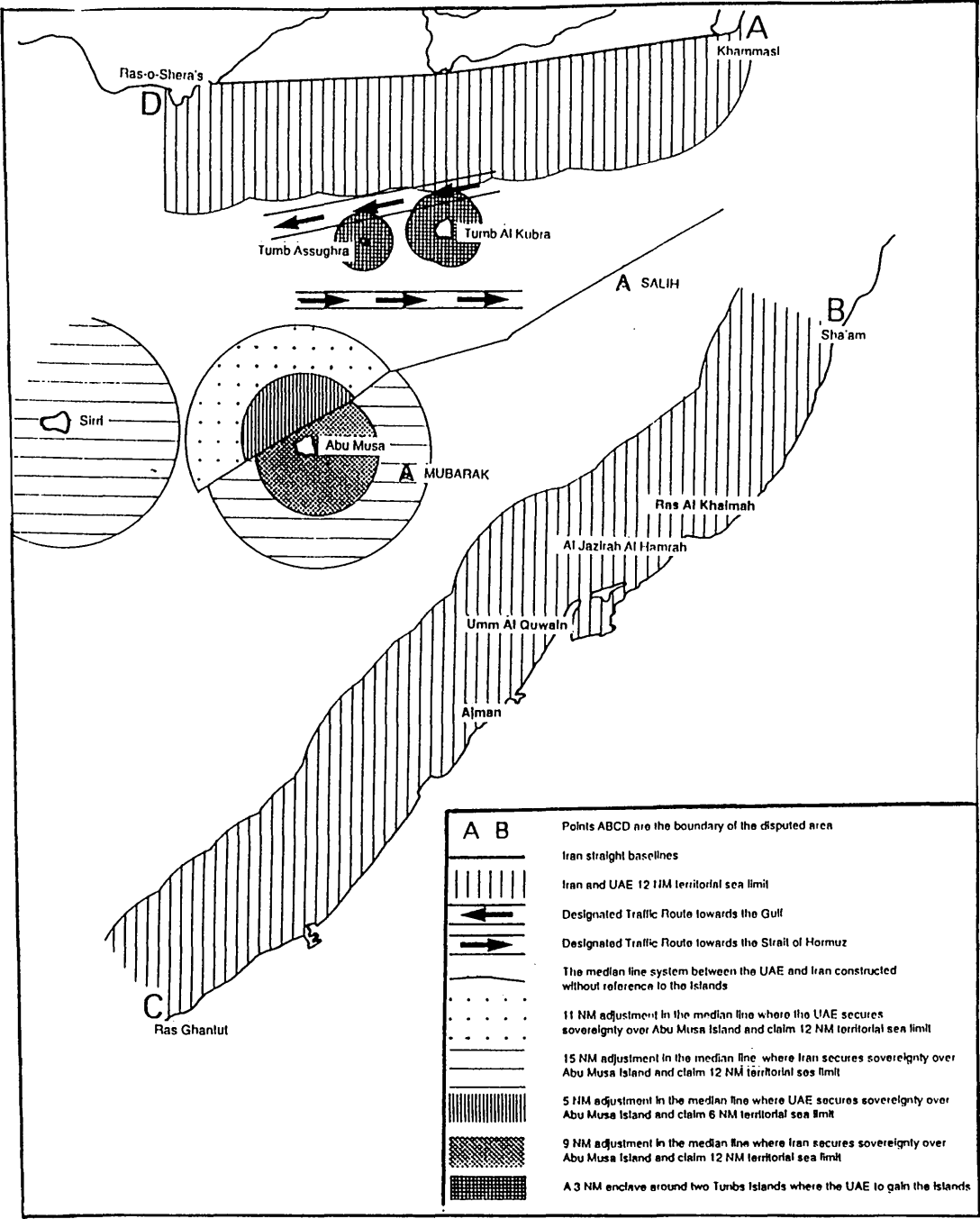


Figure: (33) A possible fair and equitable effect for the three disputed Islands.
Source: The Author.

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